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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

JACK WARD THOMAS, CHIEF,
UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

v.

PACIFIC RIVERS COUNCIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Pursuant to Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), and implementing regulations, the United States Forest Service engages in consultation with the Fish and Wildlife Service and the National Marine Fisheries Service so as to insure that any action funded, authorized, or carried out by the Forest Service is not likely to jeopardize the continued existence of a threatened or endangered species. The Forest Service typically engages in consultation when it adopts, amends, or revises its Land and Resource Management Plans (LRMPs), and when it undertakes site-specific activities consistent with the plans. The questions presented in this case are as follows:

1. Whether the Forest Service is required in addition to reinitiate consultation on the LRMPs themselves upon the listing of a new threatened or endangered species.

2. Whether the court of appeals misapplied established equitable principles by directing the district court to enjoin, pending completion of the consultation process, site-specific activities that the Forest Service has determined are not likely to adversely affect the newly listed species.

PARTIES TO THE PROCEEDINGS

Jack Ward Thomas, in his official capacity as Chief of the United States Forest Service, and the United States Forest Service were appellees/cross-appellants in the court of appeals. Pacific Rivers Council, Oregon Natural Resources Council, Hells Canyon Preservation Council, The Wilderness Society, and Oregon Natural Desert Association were appellants/cross-appellees. Northwest Forest Resource Council, Ellingson Lumber Company, Intermountain Forest Industry Association, Wallowa County, and Robert Messinger were defendants-intervenors/appellees.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Chief of the United States Forest Service and the Forest Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 30 F.3d 1050. The amended opinion of the district court (App., *infra*, 18a-44a) is reported at 854 F. Supp. 713. The district court's December 3, 1993, order (App., *infra*, 45a-47a) and its October 20, 1994, opinion on remand from the court of appeals (App., *infra*, 48a-60a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1994. A petition for rehearing was denied on September 22, 1994. App., *infra*, 65a-66a. On December 12, 1994, Justice O'Connor extended the time within which to file a petition for

a writ of certiorari to January 20, 1995. By order dated January 12, 1995, Justice O'Connor further extended the time for filing to and including February 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 6(a)-(f) of the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1604(a)-(f); Section 7(a)(1), (a)(2) and (d) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(1), (a)(2) and (d); and the definition of "action" in 50 C.F.R. 402.02 are reprinted at App., *infra*, 71a-76a.

STATEMENT

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure" that its actions are not likely to jeopardize the existence of any endangered or threatened species. 16 U.S.C. 1536(a)(2). The Forest Service is required by statute to formulate Land and Resource Management Plans (LRMPs) for units of the National Forest System. The court of appeals held that the mere existence of a forest plan is "action" within the meaning of Section 7(a)(2) of the ESA and that the Forest Service must reinitiate consultation on an existing plan upon the listing of a new species that may be affected by site-specific activities in the forest. The court rejected the government's contention that consultation on the site-specific activities themselves, and on any proposed amendments to the plans, would be sufficient to insure compliance with the ESA. Pursuant to the court of appeals' decision, the district court has enjoined (pending the completion of plan-level consultation) a broad range of site-specific activities that the Forest Service had previously

determined were not likely to adversely affect the newly listed species. Those rulings below have already substantially disrupted the management of federal lands and the consultation process under the ESA, and they threaten far-reaching consequences for the administration of more than 284 million acres of public lands in the Ninth Circuit.

1. The Department of Agriculture's Forest Service is responsible for managing the 191 million acres of land that comprise the National Forest System. See 58 Fed. Reg. 19,369 (1993). The Forest Service Manual provides for two levels of decisionmaking in the management of the System. See 53 Fed. Reg. 26,807, 26,809 (1988); 58 Fed. Reg. 19,370 (1993); *Sierra Club* v. *Robertson*, 28 F.3d 753, 758-759 (8th Cir. 1994); *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1511-1512 (9th Cir. 1992).

The first level involves decisions about plan documents. Under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, the Forest Service is required to prepare an LRMP (forest plan) for each unit of the National Forest System. "The forest plan consists of both forest-wide and area specific standards and guidelines that provide for land uses with anticipated resource outputs." 53 Fed. Reg. 26,809 (1988). With rare exceptions, the plans do not specify ground-disturbing activities (such as timber-cutting or road-building) that are permitted or required to go forward without further scrutiny. "The emphasis of the plan is not on site-specific decisions or specific resource outputs. Rather, the emphasis is on applying general management practices * * * to achieve multiple-use goals and objectives in the most cost efficient manner." *Id.* at 26,832. The plan establishes proposals (*ibid.*) that

> can be accomplished from a physical, biological, economic, and legal perspective. [But] [i]t is not certain that these

> proposals will be accomplished. First, the outputs proposed by the plan are projections or targets. For example, the number of acre-feet of water meeting water quality goals is a target number the forest will strive to attain. Another example is allowable sale quantity of timber. That is the maximum regulated volume of timber that can be sold over the planning period, not necessarily the volume that will be sold.

Forest plans serve as guides for the forests for ten to fifteen years. 16 U.S.C. 1604(f)(5). After plans are adopted, they may be changed by amendment (16 U.S.C. 1604(f)(4)) or by revision (16 U.S.C. 1604(f)(5)).

The second level of planning comes when site-specific activities are proposed. This phase requires an "analysis and evaluation of proposed actions" (53 Fed. Reg. 26,834 (1988)) based on "site-specific data" (*id.* at 26,836), not only to determine whether the proposed action is consistent with the forest plan, but also "to ensure compliance with [the National Environmental Policy Act of 1969], and to meet other appropriate laws and regulations" (*ibid.*), including the ESA. Significantly, such evaluations may result "in a decision not to proceed with a proposed project even though the project may be permissible under the Forest Plan." Clerk's Record (CR) 37(A) (Wallowa-Whitman Record of Decision) at 28.

2. The Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA* v. *Hill*, 437 U.S. 153, 180 (1978). The Act serves "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such * * * species." 16 U.S.C. 1531(b). To those ends, the

ESA imposes on federal agencies a variety of duties.[1] In particular, Section 7(a)(2) requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).[2]

Although the Act does not prescribe the manner in which consultation shall be conducted, it contains several provisions designed to facilitate and expedite consultation. First, Section 7(c) provides that each federal agency shall, with respect to action for which no construction work has begun or been contracted prior to November 10, 1978, request information from the Secretary of the Interior or Commerce whether any listed species is present in the area of the proposed action. If the Secretary advises that such species may be present, the agency undertaking the action shall conduct a biological assessment for the purpose of identifying any listed species "which is likely to be affected by such action." 16 U.S.C. 1536(c). Second, Section 7(b)(3)(A) provides that promptly after the conclusion of consultation, the

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[1] Section 4 of the ESA provides for the listing of species as "threatened" or "endangered." 16 U.S.C. 1533. A threatened species is one "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20). An endangered species is one "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6).

[2] Responsibility for administration of the ESA is divided between the Fish and Wildlife Service (FWS), located within the Department of the Interior, and the National Marine Fisheries Service (NMFS), located within the Department of Commerce. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b). Species within the jurisdiction of NMFS are listed at 50 C.F.R. 222.23(a) and 227.4. Other listed species (see 50 C.F.R. 17.11, 17.12) are subject to the jurisdiction of FWS. See 50 C.F.R. 402.01(b).

Secretary shall provide the federal agency with an opinion "detailing how the agency action affects the species or its critical habitat," 16 U.S.C. 1536(b)(3)(A); if the Secretary finds jeopardy to the species or adverse modificaton of critical habitat, the Secretary shall suggest reasonable and prudent alternatives that he believes would not violate Section 7(a)(2). 16 U.S.C. 1536(b)(3)(A).

Regulations promulgated jointly by the Secretaries of the Interior and Commerce furnish a structure for consultation under Section 7(a)(2). See 50 C.F.R. Pt. 402. The regulations provide that an agency shall "review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. 402.14(a). If the agency makes such a "may affect" determination, it is to initiate consultation. *Ibid.* If the agency further determines, however, that the action is "not likely to adversely affect" (NLAA) listed species or critical habitat, it may choose to initiate informal consultation; if it receives the written concurrence of the appropriate consulting agency (either FWS or NMFS), consultation is complete. 50 C.F.R. 402.14(b). If the action agency determines that the proposed action is "likely to adversely affect" listed species or critical habitat, or if the consulting agency does not concur in the action agency's determination that the proposed action is "not likely to adversely affect" the species, the agency must initiate formal consultation. 50 C.F.R. 402.13, 402.14.[3] That process culminates in the issuance by NMFS or FWS of a biological opinion and (if jeopardy or adverse habitat modification is found) a statement of reasonable and prudent alternatives.

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[3] While the phrase "may adversely affect" has been used frequently in this litigation by respondents and found its way into the district court's order (see App., *infra*, 61a), the Forest Service never made a finding that any of its activities "may adversely affect" the newly listed species. Its findings were limited to those specified in the regulations.

50 C.F.R. 402.14(g) and (h). The action agency is then responsible for making the final determination of whether to proceed with its proposed action. 50 C.F.R. 402.15.

Section 7(d) of the ESA, 16 U.S.C. 1536(d), limits the abiiity of federal agencies to commit resources during the consultation process. Section 7(d) states that

> [a]fter initiation of consultation required under [Section 7(a)(2)], the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2)].

16 U.S.C. 1536(d). Compliance with Section 7(d) is a statutory prerequisite for the grant of an exemption by the Endangered Species Committee pursuant to Section 7(h) of the ESA. See 16 U.S.C. 1536(h)(1)(A)(iv).[4]

3. In 1990, the Forest Service adopted LRMPs for the Wallowa-Whitman and Umatilla Forests in Oregon, following informal consultation with FWS concerning listed species within its jurisdiction. Pacific Rivers Council (PRC) Supp. ER 37(A), 37(C). On May 22, 1992, two other species found in those forests—the Snake River spring/summer chinook and fall chinook salmon, which are within the jurisdiction of

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[4] The Endangered Species Committee is composed of six designated federal officials and one individual from each affected State. 16 U.S.C. 1536(e)(3). The Committee may grant an exemption from the requirements of Section 7(a)(2) if it determines that "there are no reasonable and prudent alternatives to the agency action," 16 U.S.C. 1536(h)(1)(A)(i); that "the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest," 16 U.S.C. 1536(h)(1)(A)(ii); that "the action is of regional or national significance," 16 U.S.C. 1536(h)(1)(A)(iii); and that "neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by [Section 7(d)]," 16 U.S.C. 1536(h)(1)(A)(iv).

NMFS—were listed as threatened species. 57 Fed. Reg. 14,653 (1992); 50 C.F.R. 227.4(g) and (h).

Even before the listings, the Forest Service and NMFS had agreed to an approach for insuring that individual actions in the ecosystems that include the Wallowa-Whitman and Umatilla Forests would not jeopardize the two species. That approach, memorialized in an Inter-Agency Agreement consummated on March 6, 1992 (Gov't ER 86(5)), provided for the Forest Service to take steps at two levels. First, the Forest Service was to continue development of program-level guidance through the creation of conservation strategies for major drainages within the forests. The Agreement provided that the first prototype strategy would be developed within one year, *id.* at 2, and that the Forest Service would consider amending the previously approved forest plans to reflect the guidance in the conservation strategies. *Ibid.*[5] Second, the Forest Service was to prepare biological evaluations or assessments for all ongoing and future site-specific forest activities that might affect the newly listed species, initiate and utilize the consultation process in the regulations, and insure that site-specific activities were consistent with conservation strategies once they were adopted. *Ibid.*

When the species were listed, the Forest Service suspended all ongoing activities in the two forests except those that it determined would have no effect on, were not likely to adversely affect, or would have a beneficial effect on the listed

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[5] This first prototype conservation strategy was completed in October 1992. PRC ER 126, at 5. The Forest Service completed an environmental assessment under NEPA on a proposed amendment to the Wallowa-Whitman LRMP based on that prototype. During the formal process to amend the plan, the Forest Service is using the strategy in the prototype, as later modified, for any site-specific activities that have not been enjoined. See USDA Forest Service, Pacific Northwest Region, *Working Paper: Upper Grand Ronde Conservation Strategy for Endangered Snake River Spring Chinook Salmon* (1994).

species. The Forest Service also determined that those ongoing activities would be consistent with Section 7(d) of the Act, and it initiated consultation with NMFS regarding all ongoing activities other than those that it found would have no effect on the species. Finally, the Forest Service decided that new site-specific activities that might affect the species would not be implemented until consultation was completed on those activities. PRC ER 109, at 2.[6]

After the two new species were listed, the Regional Forester inquired whether NMFS also wished to enter into informal consultation on the existing forest plans themselves. Gov't ER 86(7) at 1. By letter dated December 8, 1992, the Regional Director of NMFS responded that such consultation would not be appropriate. He explained that

> the [Forest Service] action of adopting these LRMPs occurred in 1990. Also, LRMPs are planning documents that cover entire Forests over a relatively long time.

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[6] The Forest Service's initial evaluation of ongoing activities in the salmon watersheds considered 755 actions in the Umatilla Forest and 2806 in the Wallowa-Whitman Forest. PRC ER 123, at 6. In August 1992, the Forest Service initiated informal consultation with NMFS on all ongoing actions that it had classified as ones that "may affect" the species, as well as on new proposed actions, grouped by 11 subdrainages. PRC ER 109, at 2. In January 1993, the Forest Service initiated formal consultation on a grouping of actions in the Tucannon River Basin of the Umatilla Forest. *Ibid.* In February 1993, the Forest Service and NMFS agreed that, to facilitate consultation, most of the ongoing projects submitted for informal consultation would be resubmitted to NMFS grouped by watershed. PRC ER 123, at 8-9. The only exception was for 11 individual timber sales, for which NMFS issued a no jeopardy biological opinion in June 1993. *Id.* at 9. The then-pending Tucannon consultation, for which a biological opinion of no jeopardy was subsequently rendered in July 1993, served as a prototype for the grouping of projects by watershed. We have been informed that the Forest Service has now initiated consultation on all 16 watersheds in the Umatilla and Wallowa-Whitman Forests, with the last biological assessment submitted in April 1994.

> They do not identify specific actions that are reasonably certain to occur * * *. For these reasons, NMFS has determined that informal consultation on these LRMPs would not be constructive or necessary under the ESA at this time.

Id. at 2. The Regional Director further explained that the appropriate time for consultation on the forest plans "may be during the development of conservation strategies and on consequential amendments to the LRMPs. * * * Until that time, we should continue to consult on actions that are clearly defined and reasonably certain to occur," based on information about site-specific activities. *Id.* at 3.

4. Respondents Pacific Rivers Council *et al.* (PRC) are environmental organizations that claim that their members' interest in enjoying the newly listed species has been adversely affected by the Forest Service's failure to reinitiate consultation on the existing forest plans. App., *infra*, 21a. PRC filed suit, contending that the Forest Service was required to initiate consultation with regard to the existing LRMPs before undertaking or continuing site-specific actions in the two forests. Pending completion of consultation on the plans, PRC requested an injunction against various timber-harvesting, grazing, and road-building activities that the Forest Service had determined "may affect" the newly listed species, including ongoing activities that the Forest Service had already determined were not likely to adversely affect those species.

The district court found that the Forest Service had violated the ESA by failing to consult on the existing LRMPs. App., *infra*, 18a-44a. The court declined, however, to enter the broad injunction respondents sought. The court noted that respondents "have not challenged the [Forest Service's] determination that the identified actions do not constitute an irreversible or irretrievable commitment of resources," and

that it did not have a record before it "which would permit judicial review of these determinations." *Id.* at 44a. The court therefore held that "the scope of injunctive relief shall be limited to any proposed future actions within the Wallowa-Whitman and Umatilla forests which fall within the definition of a § 7(d) irreversible or irretrievable commitment of a resource during the consultation period." *Ibid.*

5. Respondents appealed, contending that a broader injunction should have been entered. The Forest Service cross-appealed, arguing that the mere continued existence of the LRMPs was not "agency action" requiring reconsultation on the plans themselves, and that the informal consultation begun by the Forest Service with respect to possible amendments to the LRMPs, together with consultation on site-specific actions, would insure protection for the species.

The court of appeals affirmed in part, reversed in part, and remanded. App., *infra*, 1a-17a. The court first held that LRMPs are "continuing agency action." *Id.* at 10a. The court next held that "the LRMPs are actions that 'may affect' the protected salmon because the plans set forth criteria for harvesting resources within the salmon's habitat." *Id.* at 12a. On that basis it "affirm[ed] the district court's order requiring the Forest Service to reinitiate consultation under § 7(a)(2)," making clear that "consultation on the entirety of both LRMPs is required, not just an amendment to the LRMPs." *Id.* at 13a & n.12.

The court also concluded that the injunction entered by the district court was insufficiently broad. The court held that until the Forest Service initiated consultation on the LRMPs, it could not allow the continuation of *any* site-specific activity (*e.g.*, timber-harvesting, road-building, or grazing) that it had previously determined "may affect" the newly listed salmon. App., *infra*, 15a. The court further specified that "the activity cannot go forward even after consultation is initiated if it represents an irreversible and

irretrievable commitment of resources as prohibited by § 7(d)." *Id.* at 15a n.15. The court elaborated:

> Because § 7(d) could not serve as the basis for permitting *any* agency action at the time of the hearing, we need not address the district court's rulings on whether the various commitments of resources were irreversible and irretrievable. If the Forest Service initiates consultation on the LRMPs, the court must decide if the ongoing or announced activities can proceed during the consultation period. It may find guidance in [*Lane County Audubon Soc'y* v. *Jamison*, 958 F.2d 290 (9th Cir. 1992)], where we held that the Bureau of Land Management could not go forward with any new sales of timber until consultation on a forest management plan and its effect on the threatened species was completed. Most importantly, we held that timber sales constitute *per se* irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period. *Lane County*, 958 F.2d at 295.

Id. at 16a. The court concluded by ordering a "REMAND to the district court to modify its injunction to include the ongoing and announced timber, range and road projects. This shall not preclude the district court from considering further modifications to its injunction, in accordance with our opinion, if and when consultation is reinitiated." *Id.* at 17a.[7]

6. Shortly after issuance of the panel's decision, the Forest Service initiated consultation on the two forest plans. That process is currently ongoing. On October 20, 1994, the district court issued its opinion on remand. App., *infra*, 48a-60a. The district court enjoined, pending completion of consultation on the plans, all timber-harvesting and road-building

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[7] The court of appeals denied the government's petition for rehearing with suggestion of rehearing en banc. App., *infra*, 65a-66a.

activities that the Forest Service had previously determined "may affect" the newly listed species, including those that the Forest Service had further concluded were "not likely to adversely affect" the species. *Id.* at 61a-62a.[8]

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that Section 7(a)(2) of the Endangered Species Act required the Forest Service to consult with the National Marine Fisheries Service about forest plans it had previously adopted. The mere existence of a forest plan is not agency "action" within the meaning of Section 7(a)(2). That conclusion is confirmed by the ESA regulations, which define "action" to include the "promulgation of regulations," but not their mere existence. 50 C.F.R. 402.02.

In any event, Section 7(a)(2) of the ESA does not require that consultation under the Act take place in any particular manner. Section 7(a)(2) simply directs the action agency to "insure," in consultation with and with the assistance of the Secretary of the Interior or Commerce, that its actions are not likely to jeopardize the continued existence of a listed species. Section 7(a)(2) therefore provides no basis for a court to order that consultation be carried out in some other manner where, as here, the action and consulting agencies have determined that consultation on future plan amendments and site-specific actions will be sufficient to insure protection for newly listed species. The court of appeals' contrary holding compels the responsible agencies to divert scarce public resources to the fulfillment of potentially cumbersome procedural measures that both agencies have determined to be unnecessary to achieve compliance with the ESA.

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[8] Both parties have filed notices of appeal from the district court's decision on remand.

Those disruptive consequences are compounded by the sweeping injunctive relief ordered by the courts below. That relief was entered without any showing by respondents or any finding by the courts that particular site-specific actions would be likely to jeopardize the continued existence of the species (and thereby violate Section 7(a)(2) of the Act); that such activities would be likely to result in substantial harm to the species; or even that the Forest Service had erred in its determination that the site-specific activities it allowed to continue were not likely to adversely affect the species at all. Such intrusion into the management of public lands flouts established equitable principles.

The potential consequences of the decision below are particularly serious in light of the vast expanse of public lands within the Ninth Circuit. The principal federal land management agencies—the Forest Service and the Department of the Interior's Bureau of Land Management (BLM)—have 186 land management plans covering approximately 284 million acres within the Ninth Circuit. The consulting agencies have proposed for listing 58 new species in the geographic area within the court of appeals' jurisdiction. The question whether the ESA or implementing regulations require plan-level consultation whenever a new species is listed, and the proper scope of injunctive relief, are of exceptional public importance to effective administration of the ESA and to the management of federal lands.

1. The court of appeals committed two basic errors in holding that the Forest Service was required to consult on the existing forest plans: (a) the mere existence of a plan is not "action" within the meaning of Section 7(a)(2) of the ESA, and (b) Section 7(a)(2) does not in any event require the Forest Service to consult about forest plans themselves, so long as it otherwise fulfills its duty to insure that site-specific activities are not likely to jeopardize the continued existence of listed species or adversely affect their critical habitat.

a. Section 7(a)(2) and the regulations jointly issued by the Secretaries of the Interior and Commerce provide for consultation with respect to agency "actions." See 16 U.S.C. 1536(a)(2); 50 C.F.R. 402.12-402.14. The National Forest Management Act recognizes three plan-level action points: plan adoption, amendment, and revision. 16 U.S.C. 1604(d), (f) and (j). Project-level decisions to authorize particular site-specific activities in a forest are "actions" as well. But the mere existence of an LRMP is not "action" by the agency.

The joint regulations confirm that interpretation. Under those regulations, the term "action" is defined to include, *inter alia*, "the *promulgation* of regulations" and "the *granting* of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." 50 C.F.R. 402.02 (emphasis added). That definition implies that the *adoption* of agency policy (such as an agency regulation, or the plans at issue here) is an "action," but that "the policy itself" is not.

ESA consultation with respect to programmatic documents is analogous in this respect to the solicitation and consideration of public comment by federal agencies governed by the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, prior to the promulgation of regulations. See 5 U.S.C. 553. An agency's decision to amend or repeal an existing regulation is expressly defined as "rule making," see 5 U.S.C. 551(5), and is subject to the notice-and-comment provisions. See *Environmental Defense Fund, Inc.* v. *Gorsuch*, 713 F.2d 802, 815-816 (D.C. Cir. 1983). An agency is under no ongoing duty, however, to consult with the public regarding the effect of an existing rule.[9] Similarly here, the adoption or

[9] Numerous statutes provide that judicial review of agency rules must take place within a specified period after a regulation or standard is promulgated. See, *e.g.*, Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1855(d) (suit must be brought within 30 days after promulgation); Clean Water Act, 33 U.S.C. 1369(b) (suit must be brought within 120 days after promulgation). Under such statutes, the "action" for

amendment of an LRMP is an "action," but the plan itself is not.

The conduct of the action and consulting agencies with respect to the LRMPs at issue here was fully consistent with that distinction. Prior to adoption of the LRMPs, the Forest Service and FWS engaged in informal consultation and determined that adoption of the plans was not likely to adversely affect the species that were listed at that time.[10] Shortly after the new listings, NMFS noted that "the [Forest Service] action of adopting these LRMPs occurred in 1990" and that reconsultation on the plans themselves "would not be constructive or necessary." Gov't ER 86(7) at 2. NMFS further explained that "LRMPs are planning documents that cover entire Forests over a relatively long time. They do not

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purposes of APA review is the promulgation of the rule or standard rather than the rule or standard itself.

[10] Although the Forest Service consulted with FWS prior to adopting the plans (and although the Forest Service Manual provides for such consultation, see FSM § 2671.45c(1.) (1994); PRC ER 123, at 2-3), it does not follow that such consultation is required by Section 7(a)(2). Adoption of an LRMP concededly is agency "action" subject to the requirements of Section 7(a)(2). But the Forest Service might reasonably decide that consultation elsewhere in the management process would adequately insure that the various site-specific activities the Service "authorizes, funds, or carries out" in the forests would not be likely to jeopardize listed species.

Where a plan is in some respect self-executing (in the sense that it specifies a category of on-the-ground activities that will thenceforth be required or permitted to go forward without further scrutiny), it is possible that consultation on that aspect of the plan prior to its adoption will be the only feasible way to insure that the continued existence of a listed species is not jeopardized. But where, as here, a plan (or agency policy) envisions that consultation will occur prior to any site-specific activity that may affect a listed species, the agency reasonably could conclude that it has "insure[d]" that its "action" of adopting the plan will not be likely to jeopardize the species. Of course, consultation prior to adoption of an LRMP may be sound policy even where it is not required by the ESA.

identify specific actions that are reasonably certain to occur in the Snake River sub-basins that contain species listed under the Endangered Species Act." *Ibid.*

This understanding of the nature of LRMPs is consistent with that of the Eighth Circuit in *Sierra Club* v. *Robertson*, 28 F.3d 753 (1994), which noted that "[a] forest plan * * * is a general planning tool. It provides guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years. Adoption of the Plan does not effectuate any on-the-ground environmental changes." *Id.* at 758. That understanding of the relationship between forest plans and site-specific activities cannot be reconciled with the Ninth Circuit's assertion in the present case that "the LRMPs are actions that 'may affect' the protected salmon because the plans set forth criteria for harvesting resources within the salmon's habitat." App., *infra*, 12a.[11]

The court of appeals' requirement of plan-level consultation rests on the apparent belief that the LRMPs themselves must be treated as "actions" in order to insure that site-specific activities in the forests are consistent with the strictures of Section 7(a)(2).[12] There is no basis for that concern. Section

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[11] See also *Portland Audubon Soc'y* v. *Babbitt*, 998 F.2d 705, 708 (9th Cir. 1993) (Timber Management Plans "necessarily drive the location and volume decisions which eventually culminate in a particular sale site being offered at auction"); *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) ("To the extent that the plan pre-determines the future, it represents a concrete injury"); *Sierra Club* v. *Marita*, No. 94-1736 (7th Cir. Jan. 20, 1995), slip op. 8.

[12] The court of appeals characterized the government's argument as being that "the ESA does not apply to programs or activities undertaken before the listing of a species." App., *infra*, 11a. That is not and has not been the government's view. Consistent with this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), the government has argued that the ESA does not require reconsultation, upon the listing of a new species, with respect to agency actions that have already been *completed*. See *id.* at 186 n.32 (Section 7 "affects all projects which remain to be authorized, funded, or

7(a)(2) assuredly imposes upon the Forest Service an ongoing duty to insure, in consultation with FWS or NMFS, that site-specific activities do not jeopardize newly listed species, even when those activities are consistent with an LRMP adopted prior to the listing. The court was therefore undoubtedly correct in recognizing that an existing LRMP may not be blindly or mechanically relied upon as a basis for authorizing site-specific actions without taking account of changed circumstances, such as the listing of new species.[13] Moreover,

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carried out"). We fully recognize, however, that Section 7(a)(2) imposes upon federal agencies a continuing duty to insure that their actions do not jeopardize newly listed species, even if those actions were planned or initiated prior to the listing. For example, even after a permit has been issued, the issuing agency has a continuing obligation to insure that the activities authorized by the permit do not jeopardize a listed species, so long as the agency retains the ability to revoke or modify the permit.

In the court of appeals, respondents relied in part on 50 C.F.R. 402.16, which requires "[r]einitiation of formal consultation" upon the listing of a new species if "discretionary Federal involvement or control over the action has been retained or is authorized by law." Contrary to respondents' contention, Section 402.16 does not require plan-level reconsultation here. The pertinent "action" for which consultation was previously undertaken was the *adoption* of the LRMPs—not the plans themselves. The Forest Service retains no discretionary involvement or control over that now-completed action, although it does retain discretion to amend or revise the plans. Section 402.16, moreover, governs "[r]einitiation of formal consultation," and thus by its terms applies only to actions for which formal consultation was initially undertaken. The adoption of the LRMPs at issue here was originally the subject of *informal* consultation.

[13] Indeed, the LRMPs themselves make clear that a site-specific activity that would violate the ESA may not go forward even if it is consistent with the applicable plan. See, *e.g.*, Gov't ER 84A (Wallowa-Whitman LRMP) at 4-31 ("Where [recovery] plans conflict with other management direction, the recovery plans will take precedence."); Gov't ER 84B (Umatilla LRMP) at 4-89 ("Legal and biological requirements for the conservation of endangered, threatened and sensitive plants and animals will be met."); Gov't ER 84C (FEIS for Wallowa-Whitman LRMP)

when consultation occurs on a proposed site-specific action, NMFS will be assured an opportunity to examine that action in a broader context, taking into account cumulative effects of other federal and non-federal activities, see 50 C.F.R. 402.14(g)(3), as well as programmatic considerations reflected in the forest plans and other documents and guidelines. But to say that the site-specific actions are subject to Section 7(a)(2)'s substantive mandate does not mean that the mere existence of the plan is an "action" or that consultation must be conducted on the plan itself. The court of appeals therefore erred in usurping the agencies' role in determining the appropriate procedures for insuring compliance with the ESA's substantive mandate.

b. Having determined that the LRMPs constituted "continuing agency action," see App., *infra*, 10a, the Ninth Circuit concluded—essentially without analysis—that Section 7(a)(2) of the ESA required the Forest Service "to enter into consultation on the *LRMPs themselves*." *Id.* at 14a. That conclusion cannot be sustained. Section 7(a)(2) requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). That provision does not, however, speak to the *manner* in which ESA consultation must be conducted. Thus, even if the mere existence of an LRMP were properly regarded as "action," it would not follow that the agency must consult with respect to the plan itself, or that any such consultation must begin immediately upon the listing of a new species. Rather, the ESA would simply require the agency to engage in consultation at such time and

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at IV-19 ("Regardless of the alternative, protection of listed species will take precedence over other land management direction.").

in such manner as is necessary to "insure" that site-specific activities carried out under the plan would not be likely to jeopardize the continued existence of the newly listed species.

In this case, the action and consulting agencies determined that future consultations on plan amendments and site-specific activities would be sufficient to insure that the newly listed salmon species would not be jeopardized. That expert judgment in this complex area by the agency charged with fashioning forest plans and one of the agencies charged with furnishing consultation advice under the ESA is entitled to very substantial deference. See, *e.g.*, *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2386-2387 (1994). The court of appeals did not purport to hold that the agencies' determination was arbitrary or capricious. Rather, the Ninth Circuit assumed that under Section 7(a)(2), the duty to consult "on the *LRMPs themselves*" followed *necessarily* from the court's identification of the plans as agency "action." See App., *infra*, 14a. There is simply no basis for that reading of the statutory language.

This is not to say that plan-level consultation is never an appropriate means of assuring compliance with Section 7(a)(2)'s substantive mandate. Even where later site-specific consultations would be sufficient to prevent jeopardy to listed species, plan-level consultation may frequently benefit both the action and consulting agencies by facilitating consideration of programmatic issues, identifying common characteristics or potentially cumulative effects of numerous site-specific activities, and thereby creating greater economies of scale by reducing the scope and complexity of subsequent consultations on site-specific actions. Nothing in the Act or regulations would preclude the action or consulting agency from requesting plan-level consultation for these

purposes.[14] Plan-level consultation may not be compelled by judicial decree, however, where the plan does not have self-executing features (*i.e.*, where the plan does not direct or authorize site-specific activities that will not be subject to further scrutiny). Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) ("this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments").[15]

c. The court of appeals' decision threatens substantially to undermine the efforts of federal agencies to implement the requirements of the ESA in a manner that does not unduly disrupt their management of public lands. The question, we emphasize, is not whether site-specific or programmatic consultation is the superior method of insuring compliance with the Act. Rather, ESA consultation takes place at a wide variety of levels of generality.[16] Plan-level consultation is

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[14] Indeed, plan-level consultation may be one means by which the Forest Service could implement its distinct (albeit general) duty under Section 7(a)(1), in consultation with and with the assistance of the Secretary of the Interior or Commerce, to "utilize [its] authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1).

[15] The ESA does not require federal land management agencies to generate programmatic documents at all, let alone to consult at the plan level where such documents do exist. Plan-level consultation is therefore required by the ESA only to the extent that the affected agencies determine such consultation to be essential in order to insure compliance with Section 7(a)(2)'s substantive mandate.

[16] The Forest Service is currently consulting at the project level, the individual plan level, and the multiple forest plan level, to address the needs of the salmon species at issue in this case. At the project level, in addition to the completed consultation on the 11 timber sales and the Tucannon watershed, as of December 6, 1994, the Forest Service has

typically undertaken prior to the adoption of an LRMP; amendments to an existing plan are preceded by consultation as well, as are site-specific activities undertaken pursuant to the plans. Moreover, recognizing that plants and animals do not honor the artificial boundaries of agency planning documents, agencies have increasingly undertaken ESA

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submitted to NMFS 68 biological assessments covering numerous individual projects grouped by watershed on nine national forests in the entire Snake River Basin. In the two of those nine forests at issue here, all watershed biological assessments for projects are complete and have been submitted to the NMFS. See note 6, *supra*.

At the plan level, the Forest Service timely prepared its prototype conservation strategy pursuant to its March 6, 1992, Agreement with NMFS. It presently is in the process of amending the Wallowa-Whitman Forest Plan. Conservation strategies for other specific watersheds have been put on hold, pending completion of work on the prototype and a more general strategy known as PACFISH. At the same time that the Forest Service has been in consultation on these individual and watershed proposals, it has undertaken three other programmatic strategies to address the needs of the listed species, two of which affect the two forests at issue in this case. One of these is PACFISH, an ecosystem-based, interim management strategy. 59 Fed. Reg. 14,356 (1994). PACFISH will result in amendments to 15 National Forest plans in four States, including the two here, and would serve as the basis for instructional memoranda to seven BLM districts in four States. *Ibid.* The PACFISH management strategy will serve as interim protection for anadromous fish, including the listed species, until the completion of an environmental impact statement on proposed plan amendments to address the needs of the species at the most general plan level. The Forest Service and BLM have also noticed their intent to prepare two environmental impact statements that will accompany plan amendments. See Eastside Ecosystem Management Strategy, Pacific Northwest Region, Notice of Intent To Prepare an Environmental Impact Statement, 59 Fed. Reg. 4680 (1994), revised notice, 59 Fed. Reg. 26,624 (1994); Upper Columbia River Basin Ecosystem Management Strategy, Northern and Intermountain Regions, Notice of Intent To Prepare an Environmental Impact Statement, 59 Fed. Reg. 63,071 (1994). The Eastside Strategy would result in amendments to the two forest plans in this case, as well as to other forest plans.

consultation on an ecosystem basis. The PACFISH, Eastside, and Upper Columbia River Basin strategies instituted by the Forest Service and BLM are all evidence of this change in approach. See note 16, *supra*. The President's Strategy for the Pacific Northwest (see 59 Fed. Reg. 18,788 (1994)), recently upheld by the district court in *Seattle Audubon Soc'y* v. *Lyons*, No. C92-479 WD (W.D. Wash. Dec. 21, 1994), is another. That strategy, which is specifically designed to formulate ecosystem-wide guidance and standards for managing forest resources, including the Northern Spotted Owl, has resulted in the amendment of 13 forest plans and six BLM plans in the Pacific Northwest.

The government therefore has no quarrel with the proposition that various forms of programmatic consultation may often help to prevent jeopardy to listed species. The court of appeals' decision, however, substantially disrupts the administration of the ESA by displacing the decision of the action and consulting agencies regarding the appropriate means of conducting consultation in a particular context. Here the agencies agreed that site-specific consultation and consultation on future amendments would be appropriate. The Ninth Circuit's contrary determination has no basis whatever in Section 7(a)(2) of the ESA—on which the court of appeals placed primary reliance—and it is not required by regulation. The court's directive to engage in plan-level consultation has compelled both the action and consulting agencies to divert substantial public resources to an undertaking that both agencies had previously determined to be unnecessary.[17]

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[17] Judicially imposed consultation on existing LRMPs that do not contain standards and guidelines specifically designed to address the needs of the newly listed species can be expected to result in nothing more than a decision to amend the plans to incorporate new standards and guidelines. That additional paperwork provides no benefit to the species, however, since here the Forest Service had already decided to establish standards and guidelines addressing those species and is already engaged in

2. The disruptive effects of the court of appeals' decision go well beyond the diversion of agency resources to superfluous plan-level consultation. The decision has the additional deleterious effect of imposing substantial and unwarranted limitations on the use of public lands during the pendency of the consultation process. This Court has repeatedly emphasized that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982). Rather, "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987). The injunctive relief awarded in the present case flouts that well-established principle and has no basis in this Court's ESA jurisprudence.

The district court on remand enjoined a broad range of timber-harvesting activities that the Forest Service had determined were "not likely to adversely affect" (NLAA) the newly listed species. Respondents made no effort to demonstrate, and neither of the courts below purported to find, that any of those NLAA determinations were arbitrary and capricious. Rather, the district court's decision to enjoin all NLAA timber sales was based on (1) its belief that it was required to do so by the terms of the Ninth Circuit's opinion, see App., *infra*, 54a, and (2) its conclusion that "[u]ntil [plan-level] consultations reach a stage at which reasonable and prudent alternatives are identified in the [biological opinion]

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consultation on the standards and guidelines that will form the basis for plan amendments.

process, any § 7(d) analysis necessarily must be premised upon guesswork," *id.* at 56a. The district court concluded that "rather than engage in this guesswork, I find that all NLAA timber activities, save and except any that may fall within the stipulation of the parties, must be halted at least until reasonable and prudent measures are identified within the § 7(a)(2) consultation process for the LRMPs." *Ibid.*

Thus, neither the court of appeals nor the district court on remand purported to assess the likelihood that any of the timber sales in question would actually harm the newly listed species. Rather, the court of appeals implicitly, and the district court explicitly, concluded that during the pendency of the plan-level consultation, all doubts regarding the effects of individual sales should be resolved against their implementation. That *per se* rule of injunctive relief is entirely contrary to traditional principles of equity.[18]

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[18] Under the court of appeals' decision, the "action" that violated the ESA was the continued existence of the plans in the absence of consultation. That action is distinct from individual, site-specific actions that are the subject of the injunction ordered below. Having determined that the existing LRMPs were deficient (because they did not take into account the newly listed species), the court might have sought to order the Forest Service to come into compliance with the ESA by enjoining it from relying on the plans as a justification for going forward with particular site-specific actions. Cf. *Romero-Barcelo*, 456 U.S. at 314-316; *Village of Gambell*, 480 U.S. at 544-545. But the Forest Service has never contended that site-specific actions may be allowed to proceed simply because they are consistent with the LRMPs. Rather, it has undertaken an individualized assessment of the effects on listed species of *each* of the site-specific activities enjoined by the district court. The purported invalidity of the plans provides no basis for an injunction against those site-specific actions, since nothing in the ESA or implementing regulations requires a federal agency to adopt a forest plan or otherwise to pursue a programmatic approach to land management, and nothing in the ESA automatically renders a site-specific action unlawful where a federal agency has adopted a forest plan but failed to consult about the relationship of that plan to a newly listed species.

Nothing in this Court's ESA jurisprudence suggests an exception to the rule that injunctive relief is appropriate only upon a showing of irreparable injury. In *TVA* v. *Hill*, this Court considered a proposed agency action—the closing of the gates of the Tellico Dam—which all parties conceded would lead to the eradication of the snail darter, an endangered species. See 437 U.S. at 173-174. In light of the "irreconcilable conflict between operation of the Tellico Dam and the explicit provisions of § 7 of the Endangered Species Act," *id.* at 193, the Court held that Congress's determination to "afford[] endangered species the highest of priorities," *id.* at 194, could be effectuated only by enjoining the dam's operation. Denial of an injunction under those circumstances, the Court reasoned, could not be squared with Congress's decision absolutely to forbid agency action that would result in the destruction of an endangered species' critical habitat. *Id.* at 193-195.[19] *TVA* v. *Hill* thus makes clear that in ESA cases a

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Rather, the propriety of injunctive relief against site-specific actions depends upon the probable effect of those actions upon a listed species. Cf. *Romero-Barcelo*, 456 U.S. at 314 ("The integrity of the Nation's waters, however, not the permit process, is the purpose of the [Federal Water Pollution Control Act]"). At the core of the ESA is Section 7(a)(2)'s prohibition against actions that are "likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). We may assume, arguendo, that a plaintiff seeking injunctive relief in circumstances such as these is not required to establish that the action in question actually is likely to cause the extirpation of a listed species. But that substantive standard in Section 7(a)(2) must be the central focus of a court in considering equitable relief, and plaintiffs therefore must at least demonstrate that the particular site-specific actions they seek to have enjoined are likely to cause substantial harm to the species—a showing that respondents have entirely failed to make.

[19] See *Village of Gambell*, 480 U.S. at 543 n.9 (explaining *TVA* v. *Hill* by noting that the ESA "contains a flat ban on destruction of critical habitats of endangered species and it was conceded that completion of the dam would destroy the critical habitat of the snail darter"); *Romero-*

court's equitable discretion is to some degree constrained: The extirpation of a listed species cannot be balanced against competing considerations in determining whether injunctive relief is appropriate. The decision does not suggest, however, that the ESA provides a basis for enjoining activities that have not been shown to entail substantial harm to the species.

Prior Ninth Circuit decisions had significantly extended the rule announced in *TVA* v. *Hill* by holding that, "[g]iven a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA." *Thomas* v. *Peterson*, 753 F.2d 754, 764 (9th Cir. 1985); accord *Sierra Club* v. *Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987). Even those decisions, however, "do not stand for the proposition that courts no longer must look at the likelihood of future harm before deciding whether to grant an injunction under the ESA." *National Wildlife Federation* v. *Burlington Northern R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994). In the present case, the courts below have gone well beyond prior circuit precedent by ordering injunctive relief in the absence of any showing of likely harm to the species.

Finally, even apart from the court of appeals' failure to require a showing of substantial harm to the species as a predicate for injunctive relief, there is no basis for the court's assertion that "timber sales constitute *per se* irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period." App., *infra*, 16a (citing *Lane County Audubon Soc'y* v. *Jamison*, 958 F.2d 290 (9th Cir. 1992)). Whatever the merits of the Ninth Circuit's earlier decision in *Lane County*—which held

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Barcelo, 456 U.S. at 314 ("It was conceded in *Hill* that completion of the dam would eliminate an endangered species by destroying its critical habitat. Refusal to enjoin the action would have ignored the 'explicit provisions of the Endangered Species Act.' ").

that timber sales would constitute "irreversible and irretrievable commitments of resources" during the pendency of consultation regarding a species (the Northern Spotted Owl) whose habitat was the trees themselves—that decision has no logical application to the salmon species involved in this case. Moreover, Section 7(d) forbids only an "irreversible or irretrievable commitment of resources with respect to the agency action *which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2)]*." 16 U.S.C. 1536(d) (emphasis added). Although the court of appeals stated that the timber sales "could not go forward during the consultation period," App., *infra*, 16a, it entirely failed to address the question whether those sales would foreclose the implementation of reasonable and prudent alternatives to jeopardy.[20]

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[20] Section 7(d) was enacted soon after this Court's decision in *TVA* v. *Hill;* together with the exemption procedure in Section 7(h), it was intended to prevent repetition of the Tellico Dam experience. The prohibition in Section 7(d) is not limited to actions that are likely to jeopardize a listed species—which would in any event be prohibited by Section 7(a)(2). It extends as well to actions, such as "the investments of large sums of money" in a project that may ultimately cause jeopardy, *North Slope Borough* v. *Andrus*, 486 F. Supp. 332, 356 (D.D.C.), aff'd in part, rev'd in part on other grounds, 642 F.2d 589 (D.C. Cir. 1980), that do not themselves adversely affect the species but may place the agency in a lose-lose situation—*e.g.*, a nearly completed dam that cannot be put into operation without eradicating a listed species and cannot be abandoned without substantial waste of public resources.

Compliance with Section 7(d) is a statutory prerequisite to the grant of an exemption by the Endangered Species Committee pursuant to Section 7(h) of the ESA. See 16 U.S.C. 1536(h)(1)(A)(iv). Thus, an agency's commitment of resources in violation of Section 7(d), by rendering an exemption unavailable, may ultimately lead to the waste of substantial public funds. That result is of course undesirable, even where the commitment of resources is not likely to adversely affect the species. So

3. The court of appeals has misconstrued the ESA, improperly interfered with the discretion of the expert agencies to select the most appropriate manner of consultation under Section 7(a)(2), and ordered sweeping injunctive relief in disregard of established equitable principles. The practical consequences of those rulings are particularly great in light of the vast expanse of federal lands within the Ninth Circuit and the anticipated volume of new listings within the near future. Over 284 million acres of federal land are within the jurisdiction of the court of appeals, representing approximately 64% of the National Forest System and 74% of the public domain managed by BLM. This vast acreage is covered by approximately 186 planning documents.[21] The consulting agencies have proposed for listing 58 new species in the geographic area within the Ninth Circuit. The requirement that plan-level consultation be conducted upon the listing of each new species will substantially undermine the ability of the consulting and land-use agencies to administer the ESA and public lands in an effective and workable manner.

The broad ramifications of the Ninth Circuit's rulings already are evident from the other lawsuits that have been brought in the wake of the decision below. One district court, relying on the Ninth Circuit's decision in this case, entered an injunction that would have shut down 343 ongoing activities (48 timber sales, 204 authorized grazing operations,

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long as it inflicts no substantial harm upon a listed species, however, the possibility of such wastefulness provides no basis for an injunctive remedy.

[21] The Forest Service has 67 plans covering 122 million acres of land within the jurisdiction of the court of appeals. See 36 C.F.R. 200.2; USDA Forest Service, *Report of the Forest Service: Fiscal Year 1993*, at 90 (May 1994). We have been informed that BLM has 64 Resource Management Plans covering 113 million acres of land and 55 Management Framework Plans covering 49 million acres of land.

5 road construction or reconstruction projects, and 86 mining activities) in eight National Forests in the Snake River Basin in Idaho, despite the Forest Service's determination that those activities are "not likely to adversely affect" the same two species of salmon. *Pacific Rivers Council* v. *Thomas*, Civ. No. 94-0159-S-DAE (D. Idaho Jan. 12, 1995). On January 25, 1995, the court temporarily stayed the injunction until March 15, 1995, pursuant to a stipulation of the parties. That injunction would have eliminated approximately 800 jobs directly impacted by the immediate cessation of 41 of those activities, with many more jobs affected later in the year. Plaintiffs in a second lawsuit seek to enjoin all ground-disturbing projects on 11 National Forests in Arizona, New Mexico, Utah, and Colorado. *Silver* v. *Thomas*, Civ. No. 94-127712-5 (D. Ariz. filed Aug. 9, 1994). In addition, the government has received several notices of intent to sue challenging the failure to consult on other forest plans, including one notice that points to more than 40 species that have been listed under the ESA since adoption of the LRMPs for National Forests in the Southwest Region. Letter from David Hogan to Mike Espy (Oct. 11, 1994). Review by this Court therefore is warranted.[22]

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[22] Although there is some uncertainty as to precisely when the ongoing consultation on the LRMPs in this case will be completed, the process can be expected to be completed within the next month or two. Thus, if this Court grants the petition for a writ of certiorari, the question whether programmatic reconsultation on the two plans at issue here was required upon the listing of the new species may be moot by the time that the Court decides the case. In light of the anticipated new listings and the typical duration of plan-level consultation, however, we believe that the dispute is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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FEBRUARY 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 93-36162 and 94-35042

PACIFIC RIVERS COUNCIL; ORGEGON NATURAL RESOURCES COUNCIL; HELLS CANYON PRESERVATION COUNCIL; THE WILDERNESS SOCIETY; OREGON NATURAL DESERT ASSOCIATION, PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

v.

JACK WARD THOMAS, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE; UNITED STATES FOREST SERVICE, DEFENDANTS-APPELLEES-CROSS-APPELLANTS

Argued and Submitted Apr. 6, 1994
Decided July 7, 1994

ORDER

Before: WRIGHT, TANG and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

OVERVIEW

Plaintiffs-appellants Pacific Rivers Council, *et al.* (PRC) appeal the district court's grant of a partial injunction. This injunction bars the United States Forest Service (Forest Service) from announcing, awarding or conducting any additional timber sales, range activities, or road building projects in the Wallowa-Whitman and Umatilla National Forests until it commences consultation procedures as required by the Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2) (ESA). The basis for the injunction was that the Forest Service had failed to consult with the National Marine Fisheries Service (NMFS) regarding the effects of certain Land and Resource Management Plans (LRMPs) on the Snake River chinook salmon, a species recently listed as "threatened" under the ESA. PRC argued that the district court should enjoin ongoing or announced timber, range, and road projects that the Forest Service had determined were not likely to affect the chinook. The district court accepted the Forest Service's determination that these projects were not irreversible or irretrievable commitments of resources in violation of ESA § 7(d), 16 U.S.C. § 1536(d).

The Forest Service also appeals the district court's order. It argues that because the LRMPs were adopted before the chinook were listed as a "threatened" species, the LRMPs are not agency actions requiring consultation under § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). It also argues that even if the LRMPs are deemed agency actions, the Forest Service has already begun informal consideration of potential amendments to the LRMPs to address the

listed chinook, making reinitiation of consultation superfluous.

We affirm the district court's judgment granting an injunction against the Forest Service pending compliance with the ESA. The LRMPs are important programmatic documents that set out guidelines for resource management in the forests involved in this case. As such, the LRMPs constitute continuing agency action requiring consultation under § 7(a)(2) of the ESA. We reverse, however, the district court's judgment denying an injunction against all ongoing and announced timber, range, and road projects. The district court erred in interpreting § 7(d) of the ESA to allow the ongoing activities to continue when the Forest Service had failed to enter into consultation as required by § 7(a)(2) of that statute. Accordingly, we remand to the district court with instructions to reconsider whether the ongoing and announced timber, range and road projects are irreversible and irretrievable commitments of resources which must be enjoined during consultation on the LRMPs between the Forest Service and NMFS.

FACTS

In 1990, the Forest Service promulgated and approved both the Wallowa-Whitman and the Umatilla Forest LRMPs.[1] These LRMPs establish forest-wide and area-specific standards and guidelines to which all projects must adhere for up to 15 years. The LRMPs identify lands suitable for timber production and other uses, and establish an allowable sale quantity of timber and production targets and

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[1] The Wallowa-Whitman LRMP was approved on April 23, 1990 and the Umatilla LRMP was approved on June 11, 1990.

schedules for forage, road construction, and other economic commodities. The LRMPs also seek to provide adequate fish and wildlife habitat to maintain viable populations of existing native species, and "include measures for preventing the destruction or adverse modification of critical habitat for threatened and endangered species." 36 C.F.R. § 219.1(a); 219.27(6) & (8). Every resource plan, permit, contract, or any other document pertaining to the use of the forest must be consistent with the LRMP. 16 U.S.C. § 1604(i).

Anticipating the listing of the Snake River chinook salmon as a threatened species, the Forest Service and the NMFS entered into an "Inter-agency Agreement for Fulfilling Section 7 Interagency Coordination Responsibilities under the Endangered Species Act, Snake River Basin Salmonid Habitats." They agreed to cooperate in developing and implementing conservation strategies for the listed salmon and to consider amending LRMPs that were inconsistent with these strategies. In addition, the Forest Service agreed to conduct a biological evaluation of all proposed and ongoing activities in the Wallowa-Whitman and Umatilla Forests.

On April 22, 1992, the NMFS listed the Snake River chinook as a threatened species. *See* 57 Fed.Reg. 14,653. After the salmon were listed, 755 ongoing projects for the Umatilla Forest and 2,806 for the Wallowa-Whitman Forest were subjected to a biological evaluation to determine whether particular activities might affect the salmon.[2] Over 700 projects

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[2] The evaluation process is summarized as follows:

> When the [Forest Service] biologist completes the biological evaluation process, a determination is made of "no effect" or "may effect" on the listed species. If a

were found "likely to adversely affect" the salmon. All of these were suspended pending completion of formal consultation with the NMFS.[3] Just under 1,200 of the projects were found not to affect the salmon. Another 1,700 projects were found "not likely to adversely affect" the salmon. All of the "not likely to adversely affect" projects were submitted to the NMFS for informal consultation by the end of August 1992.[4] However, the Forest Service decided to allow on-going projects to continue during the duration of the informal consultation where it previously determined that the project was not likely to adversely affect the salmon. It determined that projects it deems are "not likely to adversely affect" a species will not constitute "irreversible or irretrievable commitments of resources and can be continued."

On August 5, PRC sent the Forest Service a 60-day notice of intent to sue under the ESA, citing the agency's failure to consult with the NMFS on the effects on the Snake River chinook of the Umatilla and Wallowa-Whitman National Forest LRMPs. On

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"may effect" determination is made, the biologist then makes an additional determination of "beneficial affect [sic]," "not likely to adversely affect" (NLAA), or "likely to adversely affect" (LAA). All "may effect" determinations trigger the Section 7 consultation requirement of the ESA.

[3] Thirty of these actions were eventually downgraded to "not likely to adversely affect" because of modifications. These actions were not suspended.

[4] However, in January 1993, the Forest Service and the NMFS agreed in a "Standardized Outline for On-Going and Proposed Projects—Section 7 Consultation" to submit all actions for formal consultation. The change from informal to formal consultation did not change the initial determinations made in the biological evaluations.

October 26, 1992, PRC filed suit in federal district court in Oregon alleging that the Forest Service violated the ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). PRC moved for partial summary judgment, seeking a declaration that the Forest Service is violating ESA § 7(a)(2) and an order compelling the Forest Service to initiate consultation with NMFS on the Umatilla and Wallowa-Whitman LRMPs.[5] In addition, PRC moved for a preliminary or permanent injunction, requesting that the district court enjoin all ongoing and future activities in the two national forests that may affect the threatened chinook until the Forest Service completes consultation on the LRMPs.[6]

The district court granted PRC's motion for summary judgment and ordered the Forest Service to perform a biological assessment of the LRMPs and consult with NMFS as required by the ESA. The court also enjoined the Forest Service "from announcing, awarding or conducting any additional timber sales, range activities/grazing permits, or road building projects pending compliance with ESA § 7." The injunction covered all future activities that "fall within the definition of a § 7(d) [16 U.S.C. § 1536(d)] [as an] irreversible or irretrievable commitment of a resource during the consultation period."

However, the court refused to enjoin any of the ongoing or announced timber, range, and road

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[5] The Forest Service also filed a cross-motion for summary judgment.

[6] After PRC submitted a list of the activities it sought to enjoin, the Forest Service admitted that it had already completed twenty of the identified timber sales and ten of the identified road projects. These projects were undertaken without consultation with the NMFS.

projects under the LRMPs because it found that PRC had not adequately contested the Forest Service's determination that these activities were not irreversible or irretrievable commitments of resources under § 7(d). The district court denied PRC's motion for reconsideration of the scope of the injunction or for an injunction pending appeal. These appeals followed.

I

The Forest Service first argues that the district court erred in concluding that the LRMPs are agency actions under § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2).[7] Specifically, the Forest Service argues that the LRMPs are not ongoing agency action throughout their duration, but only when they were adopted in 1990 or if they are revised or amended in the future. The Forest Service maintains that the district court erred in determining that the LRMPs represent ongoing agency action throughout their duration.

This argument is incorrect. The LRMPs are comprehensive management plans governing a multitude of individual projects. Indeed, every individual project planned in both national forests involved in this case is implemented according to the LRMPs. Thus, because the LRMPs have an ongoing and long-lasting effect even after adoption, we hold that the LRMPs represent ongoing agency action. We affirm the district court's decision requiring the Forest Service to consult with the NMFS as required under the ESA, 16 U.S.C. § 1536(a)(2).

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[7] Although the Forest Service sought to dismiss PRC's complaint on mootness and standing grounds, it does not challenge on appeal the district court's resolution of these issues.

The Forest Service contends that the courts should defer to its administration of an ambiguous statute. It argues that the LRMPs in this case are not agency action and that its interpretation of the ESA is reasonable. It cites *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965) for this very proposition. In *Udall*, the Court stated: "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Id.* at 16, 85 S.Ct. at 801.

However, *Udall* does not mandate deference here. In *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S.Ct. 1207, 1221-22, 94 L.Ed.2d 434 (1987), the Court made it plain that

> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 [104 S.Ct. 2778, 2782, n. 9, 81 L.Ed.2d 694] (1984)). *Accord Central Montana Elec. Power Coop. v. Administrator of Bonneville Power Admin.*, 840 F.2d 1472, 1477 (9th Cir.1988).

Thus, when Congress's intent is clear, the courts, not the agency, are charged with the basic responsibility for statutory interpretation. A contrary agency interpretation is entitled to no deference. And as the Supreme Court emphasized in *TVA v. Hill*, 437 U.S. 153, 173, 98 S.Ct. 2279, 2291, 57 L.Ed.2d

117 (1978), "one would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the [ESA]." The ESA's plain language affirmatively commands all federal agencies to "insure that *any action* authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species...." 16 U.S.C. § 1536(a)(2) (emphasis added).[8] "This language admits of no exception." *TVA*, 437

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[8] In order to ensure compliance with the Act, the ESA and its implementing regulations require federal agencies ("action agencies") to consult with the appropriate federal fish and wildlife agency—NMFS, in this case—whenever their actions "may affect" an endangered or threatened species. *See* 50 C.F.R. § 402.14(a). Thus, if the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.

If the action agency subsequently determines that its action is "likely to adversely affect" a protected species, it must engage in formal consultation. *Id.* Formal consultation requires that the consulting agency—again, NMFS—issue a biological opinion determining whether the action is likely to jeopardize the listed species and describing, if necessary, reasonable and prudent alternatives that will avoid a likelihood of jeopardy. *See* 16 U.S.C. § 1535(b)(3)(A).

But if the action agency determines that an action is "not likely to adversely affect" the species, it may attempt informal consultation. *See* 50 C.F.R. § 402.13(a). This does not end the consultation process. The consulting agency must issue a written concurrence in the determination or may suggest modifications that the action agency could take to avoid the likelihood of adverse effects to the listed species. *See* 50 C.F.R. § 402.13(b). If no such concurrence is reached, the regulations require that formal consultation be undertaken. *See* 50 C.F.R. § 402.14.

U.S. at 173, 98 S.Ct. at 2291.[9] The regulations defining agency action also admit of no limitations:

> *Action* means *all* activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, *but are not limited to*:
>
> (a) actions intended to conserve listed species or their habitat;
>
> (b) the promulgation of regulations;
>
> (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
>
> (d) actions directly or indirectly causing modifications to the land, water, or air.
>
> 50 C.F.R. § 402.02 (emphasis added).

In short, there is little doubt that Congress intended to enact a broad definition of agency action in the ESA, and therefore that the LRMPs are continuing agency action. Indeed, the Supreme Court has interpreted the plain meaning of agency action broadly, in conformance with Congress's clear intent, in a case that presents striking similarities to this case. In *TVA v. Hill*, the Court rejected the Tennessee Valley Authority's contention that the ESA did not apply to a federal project (a $102 million dollar dam) that was well under way when Congress passed the ESA in 1973. *TVA*, 437 U.S. at 173, 98 S.Ct. at 2291. The Court noted that "[t]o sustain [this] position ... we would be forced to ignore the

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[9] Subsequent to the *TVA* decision, Congress amended the ESA to allow exceptions to the requirements of § 7(a)(2) in extraordinary circumstances, none of which apply here. *See* 16 U.S.C. § 1536(h).

ordinary meaning of [the] plain language [in § 7(a)(2)]." *Id.* Although the dam had been planned and approved years before the passage of the ESA, the Court found that TVA's operation of the dam constituted agency action, and it enjoined the dam's operation.[10] *Id.* The Court recognized that its reading of the ESA would produce results requiring the sacrifice of many millions of dollars in public funds. But it asserted that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Id.* at 194, 98 S.Ct. at 2302.

In this action, the Forest Service makes essentially the same argument—that the ESA does not apply to programs or activities undertaken before the listing of a species. It argues that it is not required to reinitiate consultation because the LRMPs are not continuing agency actions, but are agency actions only at the time they are adopted, revised, or amended. It further maintains that the existence of the LRMPs by themselves are not agency actions. Rather, only the specific activities authorized by the LRMPs are agency actions within the meaning of the ESA. The LRMPs themselves, the Service argues, do not mandate any action and are "merely" programmatic documents.

However, the Forest Service can cite no precedent of this or any other court which lends support to such a reading of the statute. And as shown above, *TVA* weighs heavily against the Forest Service on this

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[10] It was accepted by both parties in *TVA* that the dam's proposed operation would have eradicated the snail darter, an endangered species.

point, as is evident from the *TVA* Court's observation that "Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act." *Id.* at 186, 98 S.Ct. at 2298.

Following the Supreme Court's lead in *TVA*, we have also construed "agency action" broadly. *See Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir.1992); *Conner v. Burford*, 848 F.2d 1441, 1452 (9th Cir.1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989). More importantly, we have recognized that forest management plans have ongoing effects extending beyond their mere approval. In *Lane County*, we found that a forest management plan implemented without consultation violated the ESA. Although the management plan in that case was implemented *after* the listing of the threatened species, our reasoning is relevant. We stated that the "[forest management plan] is action that 'may affect' the spotted owl, since it sets forth criteria for harvesting owl habitat." *Lane County*, 958 F.2d at 294. Thus, we implicitly recognized that forest management plans can be actions even after their implementation.

Similarly, the LRMPs are actions that "may affect" the protected salmon because the plans set forth criteria for harvesting resources within the salmon's habitat. Among its zoning decisions, the Wallowa-Whitman LRMP allocates approximately 60,000 acres to the "management area" that surrounds the spawning grounds of the Snake River chinook. This allocation, established *before* the Snake River chinook were listed as threatened, sets guidelines for logging, grazing and road-building activities within its boundaries. Furthermore, the plans establish the allowable sale quantity of timber

as well as production targets and schedules for forage, road construction, and other economic commodities.[11]

Perhaps most telling, the Forest Service and the NMFS are amending the LRMPs, admitting that they are inadequate because they do not address the newly listed species.[12] These amendments belie the Forest Service's claim that the LRMPs do not constitute continuing agency action. They expressly acknowledge the need to revisit the LRMPs in light of the salmon's listing as a threatened species.

Given the importance of the LRMPs in establishing resource and land use policies for the forests in question there is little doubt that they are continuing agency action under § 7(a)(2) of the ESA. The fact that the Forest Service adopted these LRMPs before the listing of the Snake River chinook is, therefore, irrelevant. We affirm the district court's order requiring the Forest Service to reinitiate consultation under § 7(a)(2).

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[11] The Wallowa-Whitman LRMP includes a "Ten-Year Timber Sale Action Plan" that outlines "how the timber outputs ... are likely to be provided during the first ten years of plan implementation" and a more detailed five-year plan that displays each sale's name, location, volume, and road requirements.

[12] The Forest Service claims that reinitiation of consultation would be superfluous and unnecessary because it is in consultation regarding the proposed amendments currently under consideration. However, consultation on the entirety of both LRMPs is required, not just an amendment to the LRMPs. *Cf. Conner v. Burford*, 848 F.2d at 1453 (9th Cir.1988) ("[T]he ESA requires the [agency's] biological opinion to analyze the effect of the *entire* agency action.") Requiring the Forest Service to reinitiate consultation is not superfluous.

II

The district court accepted the Forest Service's conclusion that ongoing and announced timber, range, and road projects that may affect the Snake River chinook were not irreversible or irretrievable commitments of resources under § 7(d) of the ESA. 16 U.S.C. § 1536(d). It refused to enjoin these activities while the Forest Service consulted with NMFS on the individual projects in the LRMPs. However, the district court erred in applying § 7(d) to the instant case. As the ESA's plain language makes clear, § 7(d) applies only after an agency has initiated consultation under § 7(a)(2).[13] As detailed above, the Forest Service has, as yet, failed to enter into consultation on the *LRMPs themselves*, despite the fact that the LRMPs constitute continuing agency action under § 7(a)(2). Accordingly, we reverse the district court's judgment denying an injunction barring ongoing and announced projects that may affect the Snake River chinook.

We have previously made it clear that § 7(d) does not serve as a basis for *any* governmental action unless and until consultation has been initiated. In *Conner*, we found that the Fish and Wildlife Service had violated the ESA by failing to consider the consequences of all stages of oil and gas leases on

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[13] Section 7(d) states:

> *After initiation of consultation required under [§ 7(a)(2)]*, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [§ 7(a)(2)].

16 U.S.C. § 1536(d) (emphasis added).

certain threatened or endangered species in its biological opinion: *Conner*, 848 F.2d at 1455 n. 34. We rejected the Fish and Wildlife Service's suggestion that projects it unilaterally determined were not irreversible and irretrievable commitments of resources could go forward even though it had not obtained an adequate biological opinion as required by § 7(a)(2). *Id.*[14]

The Forest Service has not reinitiated consultation as required under § 7(a)(2). Thus, its determination that the timber, road, and range projects are not irreversible or irretrievable commitments of resources is of no moment. Section 7(a)(2) mandates that the Forest Service enter into consultation on the LRMPs. Its conclusion that these activities "may affect" the protected salmon is sufficient reason to enjoin these projects. Only after the Forest Service complies with § 7(a)(2) can any activity that may affect the protected salmon go forward.[15] Accordingly, we reverse the district court's denial of an injunction barring all ongoing and announced activities that may affect the Snake River chinook from going forward. The Forest Service

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[14] In *Conner*, we stated that

> Section 7(d) does not amend section 7(a) to read that a biological opinion is not required before the initiation of agency action so long as there is no irreversible or irretrievable commitment of resources. . . . Rather, section 7(d) clarifies the requirements of Section 7(a), ensuring that the status quo will be maintained during the consultation process. Section 7(d) is not an independent authorization for "incremental step consultation." *Conner*, 848 F.2d at 1455 n. 4.

[15] Of course, the activity cannot go forward even after consultation is initiated if it represents an irreversible and irretrievable commitment of resources as prohibited by § 7(d).

cannot go forward with these activities without first complying with the consultation requirements of the ESA.

Because § 7(d) could not serve as the basis for permitting *any* agency action at the time of the hearing, we need not address the district court's rulings on whether the various commitments of resources were irreversible and irretrievable. If the Forest Service initiates consultation on the LRMPs, the court must decide if the ongoing or announced activities can proceed during the consultation period. It may find guidance in *Lane County*, where we held that the Bureau of Land Management could not go forward with any new sales of timber until consultation on a forest management plan and its effect on the threatened species was completed. Most importantly, we held that timber sales constitute *per se* irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period. *Lane County*, 958 F.2d at 295.[16]

CONCLUSION

We AFFIRM the district court's judgment granting an injunction against the Forest Service pending compliance with the ESA and hold that the Land and Resource Management Plans constitute continuing agency action requiring consultation under § 7(a)(2) of the ESA. We REVERSE the

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[16] *See also Commonwealth of Mass. v. Andrus*, 481 F.Supp. 685, 691 (D.Mass.1979) (drilling an irretrievable or irreversible commitment) (citing *Nebraska v. Rural Electrification Admin.*, 12 ERC 1156, 1172, 1978 WL 23470 (construction an irretrievable or irreversible commitment)), *aff'd sub nom. Conservation Law Found. of New England, Inc. v. Andrus*, 623 F.2d 712 (1st Cir.1979).

district court's judgment excluding from the injunction ongoing and announced timber, range, and road projects. The district court erred in relying on § 7(d) of the ESA at a time when the Forest Service had failed to enter into consultation as required by § 7(a)(2) of that statute. We REMAND to the district court to modify its injunction to include the ongoing and announced timber, range and road projects. This shall not preclude the district court from considering further modifications to its injunction, in accordance with our opinion, if and when consultation is reinitiated.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civ. No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

Oct. 25, 1993

AMENDED OPINION

Before: MARSH, District Judge.

On October 21, 1993, the parties filed a joint motion for clarification of my opinion issued on October 6, 1993. The motion is GRANTED and my amended opinion follows.

Plaintiffs filed this action against defendants seeking declaratory and injunctive relief on grounds that the Forest Service (USFS) has violated the Endangered Species Act (ESA) by failing to engage in § 7 consultations with the NMFS on two Land Resource Management Plans (LRMPs)[1] for the

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[1] The parties use the terms "LRMPs" and "forest plans" interchangeably.

Wallowa-Whitman and Umatilla forests regarding effects of the LRMPs on threatened Snake River chinook salmon. The forest plans were adopted in 1990, the salmon were listed in 1992. Plaintiffs assert three claims for relief against the USFS: (1) violation of the ESA and APA by failing to consult with NMFS over the Wallowa-Whitman and Umatilla LRMPs; (2) violation of the ESA and APA by failing to ensure that adoption and implementation of the Umatilla and Wallowa-Whitman LRMPs are not likely to jeopardize the species; and (3) violation of ESA § 9 and the APA by "taking" listed species without an incidental take permit.

Plaintiffs now move for partial summary judgment on their first claim seeking an injunction against the continuation of all activity which has been identified by the forest service as activity which "may affect" listed salmon species. Defendants and defendants-intervenors (hereinafter "defendants," except where noted) have filed cross-motions for summary judgment or for dismissal on 5 grounds: (1) plaintiffs lack standing; (2) failure to state a claim; (3) failure to exhaust administrative remedies; (4) the LRMPs are not "agency actions" for which ESA consultation is required; and (5) mootness—that consultations on "anticipated" amendments are underway.

On July 12, 1993, during oral argument on the motions, I directed several questions to the parties regarding: (1) the scope of plaintiffs' requested relief and what activity they *specifically* sought to stay by injunction; (2) what practical effect compliance with the ESA would have on the LRMP beyond ESA compliance on site-specific activities and anticipated "conservation strategies" for listed chinook; (3) the scope, purpose and actual in-practice use of the LRMPs by the Forest Service; and (4) what the

Forest Service is actually doing now and under what time-line.

Plaintiffs and defendants submitted supplemental briefs and responses pursuant to my requests and both did an excellent job of providing direct, concise responses to my questions for more background information. In addition, the parties submitted a copy of the entire Wallowa-Whitman LRMP and the biological opinion prepared for the Tucannon River Subbasin which have aided my understanding of the issues.[2]

Discussion

a. *Standing*

Section 11 of the ESA, 16 U.S.C. § 1540(g), provides that "any person" may maintain an action against another person, or against a government entity, for violations of the ESA.[3] Parties seeking to invoke federal jurisdiction under the ESA must allege the following: (1) an injury in fact; (2) a causal connection between the injury and the challenged action; and (3) that the injury is likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, — U.S. —, —, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

Plaintiffs are five non-profit organizations interested in monitoring and protecting public lands,

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[2] For further background on the historical development of land and resource planning in the U.S., *see* Charles Wilkinson and Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Or.L.Rev. 1 (1985).

[3] The ESA defines "person" to include any "individual, corporation, partnership, trust, association or any other private entity," or government or municipal entity. § 1532(13).

waters and wildlife. Plaintiffs claim that their members "derive recreational, scientific and aesthetic benefit" from the existence of listed Snake River chinook through observation, study and recreational fishing within the Umatilla and Wallowa-Whitman National Forests.[4] Plaintiffs contend that their interests in the listed species have been adversely affected by defendants' failure to consult on the impacts of the LRMPs on the listed species.

Defendants have no dispute with plaintiffs' interest in the listed species in the Wallowa-Whitman and Umatilla forests,[5] but contend that plaintiffs have failed to allege facts sufficient to show "causation" and "redressability,"—i.e. if the plaintiffs' requested relief is ordered, it will have no impact on the listed species because of the broad programmatic nature of the LRMPs.

The heart of defendants' challenge to plaintiffs' standing relates to the underlying merits of plaintiffs' claim. Plaintiffs have countered these arguments by proffering declarations from Jonathan Rhodes, an hydrologist with the Columbia River Inter-Tribal Fish Commission (CRITFC), and Dale McCullough, a fishery scientist with CRITFC.

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[4] Plaintiffs have submitted affidavits from Ric Bailey, Executive Director of plaintiff Hells Canyon Preservation Council, Dan Wadosky, a member of plaintiff Oregon Natural Desert Association, and Tim Lillebo, a member and staff person for plaintiff Oregon Natural Resources Council.

[5] Declarations by organization members who have used and will continue to use forests are generally sufficient to satisfy "injury-in-fact," the first element of standing. *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581-82 (9th Cir.1993); *see also Portland Audubon Society v. Babbitt*, 998 F.2d 705, 707-08 (9th Cir.1993) (NEPA standing).

Supported by these declarations, plaintiffs contend that the standards and guidelines in the LRMP are either "too vague" to provide sufficient direction to protect listed chinook habitat, ignore essential aspects of listed salmon habitat, and, where the LRMPs provide specific minimum guidelines (such as to 100 foot riparian "buffer zone"), such guidelines are an inappropriate "floor" to adequately sustain the habitat of the listed species. Further, plaintiffs contend that site-specific consultations would fail to ameliorate potential harm because, in part, such consultations fail to adequately consider long-range future effects and have a relatively narrow geographic focus.

The Ninth Circuit has rejected similar arguments by government defendants regarding the "nexus" required between an alleged procedural violation in the adoption of a management program and harm which could flow from actions authorized under a program. *See Seattle Audubon Society v. Espy*, 998 F.2d 699, 703 (9th Cir.1993) (allegation that interagency strategy failed to consider new information about spotted owl in violation of NEPA and NFMA constituted sufficient "harm" to group's interest in owl to satisfy standing causation requirement); *Portland Audubon*, 998 F.2d at 708 (standing under NEPA established since Timber Management Plans "necessarily drive the location and volume" of decisions which "culminate" in timber sales); *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1515 (9th Cir.1992) (that potential injury may result from chain of events does not doom standing, otherwise programmatic authorization could escape review). Thus, while defendants are technically correct that an LRMP itself should have no direct impact upon listed salmon,

actions authorized under an LRMP—such as timber harvesting or grazing—may adversely affect the species.

For the limited purpose of establishing standing, I find that the declarations of plaintiffs' members adequately support the existence of an "injury-in-fact," and that the three declarations of Jonathan Rhodes, and portions of the declarations of Dale McCullough adequately allege causation—that the Forest Service's failure to initiate § 7 consultation procedures with respect to the LRMPs may harm listed species, and redressability—that compliance with the ESA may ameliorate such harm.[6]

b. *The LRMPs*

(1) *What is an LRMP?*

Under National Forest Management Act, 16 U.S.C. § 1604 (NFMA), the USFS is directed to prepare land

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[6] Government defendants' argument about exhaustion of administrative remedies was premised upon an erroneous assumption that plaintiffs were seeking to compel the Forest Service to revise or amend the LRMPs under the NFMA regulations, 36 C.F.R. 219.10(f) & (g). In their supplemental memoranda, plaintiffs have unequivocally stated that they do *not* seek amendment of the LRMPs—only consultation under § 7 of the ESA which may or may not ultimately lead to LRMP amendments or revision. Defendants do not contend that the ESA requires exhaustion.

Even if exhaustion was required, however, I find that the letters of September 28, 1992 and December 8, 1992 between John Lowe, the Pacific Northwest Regional Forester, and Rolland Schmitten, Regional Director of the NMFS demonstrate that further administrative relief would have been futile. *See Fraley v. Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir.1993) (exhaustion not required in face of official policy and notice of intent to comply with such policy).

and resource management plans for individual units of the national forest system which serve as guides to the agency's management for 10-15 years. 16 U.S.C. § 1604(f)(5). A forest plan must provide for multiple use and sustained yield of goods and services from the national forest maximizing long term net public benefits in an environmentally sound manner; meet specified requirements covering a wide-range of forest resources and activities including wildlife; provide adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species; and "include measures for preventing the destruction or adverse modification of critical habitat for threatened and endangered species." 36 C.F.R. 219.1(a); 219.27(6) & (8); *see also* Wallowa-Whitman LRMP, 2-9. The USFS is directed to select "management indicator species (MIS)," which may or may not be listed species, and thereafter set objectives within the forest plans for maintaining and/or improving MIS habitats. 36 C.F.R. § 219.19(a) and 219.20. Every resource plan, permit, contract, or any other document pertaining to the use of the forest must be consistent with the Forest Plan. 16 U.S.C. § 1604(i).

The LRMPs at issue in this case are designed to "guide all natural resource management standards and guidelines," for the Umatilla and Wallowa-Whitman National Forests "for the next 10 to 15 years." The Wallowa-Whitman LRMP was approved on April 23, 1990 and the Umatilla LRMP was approved on June 11, 1990—approximately 2 years prior to the listing of the Snake River chinook salmon. The plans include multiple use goals, activity management and maximum forest-wide

allowable timber sale quantity—"ASQ."[7] The "Management Goals" section notes social and economic needs and a desire to generally preserve, protect and enhance "values of the forest's wilderness" and to "double" anadromous fish runs in the Columbia River Basin by the year 2000.

The LRMP section entitled "Forest-wide Standards and Guidelines" covers a broad range of areas including cultural resources, soil quality, recreation, and timber and range management. Anadromous fish and fish habitat are addressed in sections covering watersheds, threatened, endangered and sensitive species and wildlife. The MIS for riparian and aquatic habitats within the Wallowa-Whitman forest only relate to steelhead and resident trout. The watershed section lists 32 standards and guidelines including priority for fish habitat, cooperation and compliance with state agencies and water quality regulations, a 100 foot no timber harvest zone aside class I and II streams,[8] temperature stability goals for class I and II streams, cumulative effects analysis and monitoring, recommendations regarding limitations on heavy

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[7] Specific ASQ levels are addressed in the accompanying EISs prepared by the USFS. "ASQ" or "allowable sale quantity" is defined as the "upper limit of harvestable wood to be sold from suitable forest land during the first decade of the planning period" and is usually expressed as an annual average ASQ. Timber Sale Program Quantity "TSPQ," is the volume of timber planned for the decade and includes ASQ along with additional material planned for sale. In the Wallowa-Whitman LRMP, TSPQ is 207 MMBF and ASQ is 141 MMBF.

[8] The LRMP sets forth four stream classifications in descending priority. Class I streams provide water for domestic use or are used by large numbers of fish for spawning, rearing or migration. *See* Wallowa-Whitman LRMP Glossary, at 45.

equipment use and mining activities near riparian zones, and restricting livestock grazing in municipal watersheds to recreation pack stock. The endangered species section essentially directs compliance with the ESA by requiring biological evaluations for each proposed project as well as cooperation with other state and federal agencies, data collection and monitoring. The wildlife section provides several guidelines for riparian zone management including 60-100% stream shade on live streams, and specific streamside sediment and stability goals.

Defendants do not contend that steelhead or resident trout constitute adequate "indicator" species to protect listed chinook. However, since the adoption of the LRMPs, the Forest Service has considered the listed chinook on a policy-level basis. The "white paper" prepared by Rick Roberts'[9] staff following implementation of the Forest Plan Adjustment Strategy (FPAS), looked at current standards and guidelines for fish, water quality and riparian areas in light of recent ESA listings of Snake River chinook and other listing petitions and recommended "more in depth discussion of federally listed species Recovery Plan objectives in the LRMP's (sic)" with reliance upon "project-level" environmental analysis in the interim. In addition, the USFS entered into an inter-agency cooperative agreement with the NMFS for the express purpose of implementing Forest Plans to be consistent with the ESA. In a directive issued by John Lowe to Forest Supervisors and Directors on September 2, 1992, he notes that, in conducting the FPAS to evaluate the need for changes in the Forest Plan, several studies

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[9] Rick Roberts is the designated ESA coordinator for the National Forests in Region 6.

of forest health and anadromous fish habitat management "which may significantly affect Forest Plan analysis and standards and guidelines are now in progress." This interagency agreement contemplates the adoption of "conservation strategies," the preparation of biological opinions and biological evaluations on all projects that "may affect" listed species. Thus, the USFS acknowledges that there may be a need for change or amendment of some kind in the LRMP to further address anadromous fish habitat.

An example of this continuing evaluation is found in the Upper Grande Ronde River Subdrainage Proposed Conservation Strategy ("UGR Strategy"), which is the first and, at this time, only conservation strategy completed for the Wallowa-Whitman forest. Roberts describes this strategy as the "prototype" which is "now going through the decision making process as an amendment to the Wallowa-Whitman LRMP." The need for such a plan is vividly demonstrated in the UGR Strategy. First, it provides a bleak outlook on current anadromous fish habitat conditions (80% deteriorated conditions with only 24 adult spring/summer chinook returning in 1992), and then proposes active floodplain management through canopy closures of 40-75%, streamside shading of 80%, and increasing riparian zone groundcover to 90%.

(2) *The Issues*

The complaint and defenses in this case raise three central and interrelated issues: (1) Is an LRMP an agency action? and (2) If so, is it the *type* of agency action which requires ESA consultation? and (3) If not, is the USFS currently complying with the ESA by consulting on site-specific issues only and by

creating an interagency cooperative agreement with NMFS?

Government defendants argue that they have complied with the ESA by adopting a "Forest Plan Adjustment Strategy," (FPAS) and an "inter-Agency Agreement" between the USFS and NMFS. In a nutshell, the Forest Service determined that the best way to address forest management following the salmon listings was to leave the LRMPs as-is and, instead, conduct consultations on a site and activity specific basis.[10] The USFS would do this by organizing the two areas into 11 discrete "watersheds" and by establishing a coordination agreement with NMFS for site-specific activities. John Lowe, the Regional Forester, summarizes the defendants' position in his September 18, 1992 letter to Rolland Schmitten, Regional Director for NMFS:

> "the LRMP's (sic) provide program direction to the Forests. The environmental impact statements (EIS) developed for each of the LRMP's addressed the potential effects of implementing programs rather than site specific issues. The nature of a programmatic EIS does not allow for an analysis that would provide a substantive discussion relative to potential effects to a given population of salmon. Projects developed under the direction of the LRMP's require additional NEPA analysis that address site-specific effects. The LRMP's (sic) as well as Forest Service

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[10] For example, according to Rick Roberts, the designated ESA coordinator for the National Forests in Region 6, the Wallowa-Whitman National Forest submitted biological evaluations for 11 timber sales between July and November of 1992 to NMFS. On June 9, 1993, NMFS issued a biological opinion that the proposed sales were "not likely to jeopardize the continued existence" of the listed salmon.

> direction, require that all projects comply with the ESA and be evaluated with the threatened and endangered species in mind. The Forests are currently consulting with the NMFS on those proposed projects that have the potential to affect listed salmon."

Schmitten agreed with this assessment as set forth in his written response of December 8, 1992: "Informal consultation on these LRMPs would not be constructive or necessary under the ESA at this time." Schmitten notes, however, that, if conservation strategies developed under the Inter-Agency agreement conflict with LRMPs standards or guidelines, the USFS agreed to consider amending the LRMPs.

c. Where does the ESA fit in?

(1) *The Law*

The Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, was enacted by Congress in 1973 to conserve endangered and threatened species. The 1973 Act eliminated the proviso from prior acts that endangered species be protected "where practicable" and directed instead that the "balance [be] struck in favor of affording endangered species the highest of priorities." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180-181, 195, 98 S.Ct. 2279, 2294-2295, 2302, 57 L.Ed.2d 117 (1978); *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir.1987) (noting that ESA significantly restricts court's equity jurisdiction).

Section 7 of the ESA imposes both substantive and procedural requirements upon federal agencies. Section 7(a) requires that agencies "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued

existence of any endangered or threatened species." § 1536(a)(2). This general proscription covers direct threats to species as well as destruction or adverse modifications to "critical" habitat. *Id.* "Agency action" is broadly defined in the regulations to include "all activities or programs of any kind" including:

> "(a) actions intended to conserve listed species or their habitat; [or]
>
> * * * * * *
>
> "(d) actions directly or indirectly causing modifications to the land, water or air."

50 C.F.R. 402.02.

Sections 7(b) & (c) prescribe a three-step process which includes an initial screening to determine if an endangered species "may be present," and a biological assessment to determine if the present species is "likely to be affected." If the biological assessment determines that an action "may affect" a listed species, the Act requires the action agency to engage in "formal consultation" with the U.S. Fish and Wildlife Service (FWS) or NMFS. Following formal consultation, the FWS or NMFS issues a "biological opinion" evaluating the nature and extent of jeopardy posed to the listed species by the agency action and, if jeopardy is found, suggesting reasonable and prudent alternatives to avoid jeopardy. 15 U.S.C. § 1536(b); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir.1985). After initiation of consultation under the ESA, section 7(d) requires the maintenance of the status quo by directing that the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent

alternative measures." *See Lane County Audubon*, 958 F.2d at 294 (§ 7(d) designed to maintain status quo pending consultation).

(2) *The Regulations*

Regulations promulgated under § 7 of the ESA further refine the 3-step consultation process. As stated above, the action agency makes a biological assessment in the screening process in order to determine if a pending action is likely to affect a listed species that is present. Under the regulations and practices of the USFS, the agency's biological evaluation may result in one of two findings: "no effect" or "may affect."[11] A conclusion of "no effect," if carefully documented, requires no consultation.

If an action is classified as a "may affect," it undergoes a further level of classification: beneficial affect, not likely to adversely affect, or likely to adversely affect. *Id.* As an alternative to a biological assessment, regulation 402.13 would imply that the

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[11] Rick Roberts describes the USFS' biological evaluation process in his second declaration, at paragraphs 6 & 7. The "process" is conducted by a USFS biologist who reviews the proposed action and examines any impacts of potential effects on listed species.

NFRC argued that the USFS "has determined that the plans ... do not affect listed species or critical habitat," citing John Lowe's letter to Rolland Schmitten of September 28, 1992. To the extent NFRC attempts to argue that this satisfied the first stage of an ESA consultation, I disagree for two reasons. First, John Lowe is identified as a regional forester, not a biologist. Second, Lowe claims that the USFS will not consult on the LRMPs because they are programmatic documents not amenable to consultation analysis—not because the USFS has reviewed the LRMP and determined that it would have no effect on the listed species.

action agency may undergo informal consultation to determine if the action is likely to adversely affect a listed species. In either event, if the action is found to be one which "may affect" (likely to or not likely to adversely affect) a listed species, the NMFS may "suggest modifications" to the proposed action to further "avoid the likelihood of adverse effects" upon listed species or their habitat. § 402.13. Actions classified either in a biological assessment or informal consultation process as "likely to adversely affect" must undergo formal consultation with NMFS. § 402.14.

According to Rick Roberts, all site specific actions within the LRMPs and in areas in which the species may be present are undergoing formal consultation which will result in the production of either a biological assessment (produced by the USFS) or a biological opinion (produced by NMFS). Roberts also indicates that *during* the consultation process, only those actions classified as "beneficial affect" or "not likely to adversely affect" are permitted to continue because "they have been found not to make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measure which may be generated in the formal consultation process." *See also* Exhibit 9 to the Declaration of John Lowe ("[O]ngoing range allotments that are determined likely to adversely affect will not be allowed to continue in 1993.").

(3) *Application of the Law and Regulations to LRMPs*

There is no dispute that listed chinook species and listed chinook habitat are present in the Wallowa-Whitman and Umatilla forests and, thus, the protection of the ESA, one of the "most comprehensive legislation for the preservation of the endangered species ever enacted" *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978), is applicable to these geographic areas. There is also no question that forest "habitat" management is one of the critical factors of the overall program needed to protect the listed chinook. *See* generally, *Pacific Northwest Generating Cooperative v. Brown*, 822 F.Supp. 1479 (D.Or.1993).

In addition to the general ESA principles discussed, *infra*, the legal analysis in this case centers upon three decisions which provide some spectral parameters: *Lane County Audubon*, *Swan View*, and *Conner v. Burford*.

In *Lane County Audubon Society v. Jamison*, 958 F.2d 290, 293 (9th Cir.1992), the court addressed the issue of whether the Jamison Strategy was an agency action which required the BLM to consult with the FWS pursuant to ESA § 7 prior to implementation. The Jamison Strategy was a document created in response to the listing of the Northern Spotted Owl which provided 1991 and 1992 timber sale management guidelines within BLM forests in Washington, Oregon and California. The court held that the Jamison Strategy was an "agency action" which required ESA consultation prior to implementation. I have reviewed the Jamison Strategy and, much like sections within the LRMPs in this case, it merely provided broad, general, programmatic guidance to

the BLM regarding where not to harvest timber to protect the Spotted Owl while meeting a program goal of 750 MMBF. The court specifically rejected the BLM's argument that the strategy constituted a mere "policy statement" and found that, in implementing the strategy through the adoption of individual sale programs prior to engaging in consultation with the Fish and Wildlife Service, the BLM had violated the ESA even though the BLM *had* consulted with the FWS on individual sales. *Id.*, at 293-94.

Defendants rely primarily upon *Swan View Coalition v. Turner*, 824 F.Supp. 923 (D.Mont.1992) for the propositions that: (1) the "mere continued existence" of an LRMP and the listing of an endangered species subsequent to the adoption of an LRMP does not require ESA consultation or adoption or amendment to an LRMP and; (2) that purely programmatic *portions* of an LRMP may rely upon subsequent site specific consultations. In *Swan View*, plaintiffs claimed that the FWS violated the ESA by failing to prepare an adequate biological opinion addressing the impact of the USFS' adoption of the Flathead Forest Plan (an LRMP) on the threatened grizzly bear and the endangered gray wolf. The plaintiffs' claim was premised upon the fact that specific portions of the Flathead Forest Plan—such as resource production objectives and zoning decisions—failed to include evaluations of impacts on the listed species. *Id.*, 824 F.Supp. at 933. The court rejected this argument, finding that the FWS "properly focussed on the standards and guidelines adopted in the Plan which directly relate to the protection of threatened and endangered species." *Id.*, at 933. *See also Village of False Pass v. Clark*, 733 F.2d 605, 607 (9th Cir.1984) (finding biological

opinion adequate even though it failed to specifically address drilling and seismic testing limitations to protect gray and right whales).[12] The court further noted that it was particularly "impressed" by the consideration for the grizzly bear included in the Forest plan through the adoption of a set of "inter-agency grizzly bear guidelines." *Id.*

Defendants concede that *Swan View* differs from this case because the FWS had in fact engaged in ESA consultations on the listed species. Defendants argue, however, that the crux of plaintiffs' argument that ASQ or floodplain management guidelines might have differed had the USFS consulted with NMFS essentially mirror the claims rejected by the court in *Swan View*. I find *Swan View* is clearly distinguishable because the challenge was limited to the adequacy of the biological opinion whereas in this case there is nothing to review since the USFS has not determined, either on its own through a biological assessment, or in consultation with the NMFS, whether the LRMPs may affect listed salmon species.[13] The district court specifically found that additional future biological consultations on site specific issues made sense in part, *because* the Forest

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[12] Unlike *Conner*, the court in *Village of False Pass*, found the step ESA consultation process acceptable by relying in part, upon the 3-step process prescribed in the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331, for off-shore oil drilling. The court approved the step application for ESA consultation in large part because the Secretary included prominent disclaimers at each phase (lease, exploration, development & production), retaining discretionary authority to suspend activity whenever migrating whales were located near the area. *Village*, 733 F.2d at 611.

[13] Defendants did engage in ESA consultations in connection with the LRMPs for "then-listed" species (1990—the date of adoption) such as the bald eagle.

Plan included an analysis of the "detailed standards and guidelines adopted" for the protection of the listed species, *Id.*, at 933, which are not present in this case.

In *Conner v. Burford*, 848 F.2d 1441 (9th Cir.1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989), the USFS requested formal consultations with the FWS regarding impacts of an oil and gas lease program on listed species (grizzly bear, gray wolf, bald eagle and peregrine falcon) in the Flathead National Forest. Both the FWS and USFS agreed that they had insufficient information to render a comprehensive biological opinion on the program, and, instead, decided to engage in consultations and preparation of additional biological opinions at various stages of post-leasing activities. *Id.*, at 1444. Plaintiffs challenged the USFS and FWS on NEPA grounds and on grounds that the sale of leases without a biological opinion assessing the impact of post-leasing activities on endangered species violated the ESA. The district court agreed, setting aside all agency actions allowing the issuance of oil and gas leases and enjoining the government from issuing or recommending any more leases until compliance with the ESA and NEPA. *Id.*, at 1445. On review, the court reversed the district court's conclusion on several of the alleged NEPA violations, but affirmed the district court's ESA conclusions. The court specifically rejected the defendants' proffered "incremental step consultation" as a substitute for a comprehensive biological opinion, noting that species like the grizzly "require large home range making it crucial that ESA review occur early in the process to avoid piecemeal chipping away of habitat." The court expressly rejected any attempt to read into the ESA an authorization for incremental step consultation,

noting that § 7(d), which "prohibits the irreversible or irretrievable commitment of resources which might foreclose reasonable and prudent measures, acts to ensure that the status quo be maintained during the consultation process." *Id.*, at 1455, n. 34.

Defendants argue that *Conner* should be distinguished from this case because, unlike a lease, the LRMP is a "broad framework" for management—not a commitment to development—so that additional review at each subsequent stage of development will adequately protect the species. *See e.g. Swan View*, 824 F.Supp. at 936. In addition, defendants point out that, unlike *Conner* and *Swan View*, plaintiffs do not contend that the LRMPs were illegal when adopted in 1990—and that instead, the issue is whether *re-initiation* of ESA consultation is required given the subsequent listing of Snake River chinook.

In their response to plaintiffs' statements of material facts, government defendants argue that the LRMPs are "not agency actions for purposes of the ESA." Yet in their opposition brief and memo in support of their motion for summary judgment, defendants acknowledge that the LRMPs clearly are agency actions, but argue that they were "complete" upon their adoption in 1990. They even go so far as to analogize the LRMPs to the "completion of a dam." I find both arguments and the analogy contrary to the descriptions of the LRMPs by Lowe and Schmitten—the LRMPs are clearly agency actions with ongoing application to current and future activities, and further, defendants acknowledge that the LRMPs are *subject* to modification and review.

Defendants have also argued that the LRMPs have no application to the "jeopardy" determination made by NMFS. I have construed this argument as further support for what is essentially a contention that

there is no rational connection between the ESA consultation process and the LRMP. The flaw in this suggestion is that the "jeopardy" determination by NMFS is really just the last step of the ESA process. The first two steps which are taken solely by the USFS—the biological evaluation and the determination of "no effect" or "may affect"—are implemented pursuant to the LRMP. The LRMP's endangered species guideline directs the USFS to comply with the ESA and the USFS' determination of "no effect" or "may affect" are made by reference to LRMP guidelines. For example, in the Tucannon Basin biological assessment for the Dry Creek/Phillips Creek/Gordon Creek/Cabin Creek Watersheds in the Umatilla Forest, two timber sale units, Little Big Hole 21 and 54 were initially classified as "likely to adversely affect" salmon habitat because they would include harvest within 20-50 feet of a perennial stream and their removal would increase stream temperature. Both sales units were modified to provide a 100 foot no-cut buffer zones, consistent with LRMP Watershed Guideline # 6, and thereafter re-classified as an activity "not likely to adversely affect." *See also* Asotin Creek Watershed Assessment (noting similar buffer modification and reclassification).

Aside from the difference in timing, I find little to distinguish the LRMPs in this case from the Jamison Strategy analyzed in *Lane County Audubon*—site-specific projects and activities are implemented pursuant to LRMP standards and guidelines and, thus, under *Lane County Audubon*, constitute agency actions to which the ESA three-step consultation process applies.

In addition, I note that the environmental impact statements to the LRMPs, prepared as required

under NEPA, specifically acknowledge that the LRMPs are "major federal actions," which may be "amended or revised to respond to changing needs and opportunities." NEPA consultations are only required for "major federal actions" having a significant effect on the human environment, 42 U.S.C. § 4332(2)(C), while the three-step review process under the ESA is triggered for "*any* action" taken by an agency. 16 U.S.C. § 1536(a)(2). *See Conner*, 848 F.2d at 1457-58, n. 40 (strict substantive provisions of the ESA just more stringent enforcement of its procedural requirements compared to NEPA).

Finally, the language of ESA itself suggests that it applies with equal force to actions "authorized," in the past tense under § 7(a)(2), as well as "prospective" agency actions under § 7(a)(3). Had Congress intended that the ESA should apply only to actions authorized or undertaken *after* a pertinent listing decision, it could well have provided such a "prospective" limitation within § 7(a)(2). Had the challenged agency action been the authorization of certain specific timber sales which were completed in 1990, defendants would in all likelihood prevail on mootness grounds. However, I find that the ongoing application of the LRMP to current and future actions makes it a viable candidate for ESA consultation. There is simply nothing in the ESA or its implementing regulations to suggest that the term "agency action" is limited to those programs instituted *following* a listing decision, and further such a temporal restriction would be contrary to the Ninth Circuit's directive that the term be "broadly construed." *Lane County Audubon*, 958 F.2d at 294, *citing Conner*, 848 F.2d at 1452.

Defendants' argument that it would be unduly burdensome to require amendment of the LRMPs

each time a resident species is listed misses the mark since this case is not concerned with compliance with the NFMA—i.e. whether there are adequate guidelines in place to ensure the "viability" of existing species—but is strictly limited to procedural and substantive compliance with the ESA. The ESA does not directly require amendment of the LRMP, but merely requires that the USFS start the three step process of biological examination and possible consultation.

I am sympathetic to the confusion created when two statutes—in this case the NFMA and the ESA—both require protection of the listed species and understand why defendants would take the position that by consulting on all site-specific and project-specific activities and by studying habitat conditions within watersheds and attempting to create new guideline amendments for the LRMPs to enhance endangered species protection, they would, in effect, be complying with the spirit of the ESA by working to protect listed chinook. However, while one might be able to conclude from the evidence presented that defendants are in compliance with the NFMA, where both the NFMA and ESA apply, both statutes must be followed. *See Seattle Audubon Society v. Evans*, 952 F.2d 297, 302 (9th Cir.1991) (compliance with ESA failed to excuse violations of NFMA's requirement that USFS maintain a "viable" owl population).

Based on the foregoing, I find that the Wallowa-Whitman and Umatilla LRMPs are "agency actions," which are being and will be applied to areas in which listed chinook are present since they set forth standards and guidelines for modification of, and multiple-use of resources within listed species habitat. Accordingly, the USFS must apply the ESA

three-step consultation procedure to the Wallowa-Whitman and Umatilla LRMPs.[14]

(4) *Injunctive Relief*

Plaintiffs have submitted a list of ongoing and proposed projects within the Umatilla and Wallowa-Whitman for which they seek injunctive relief. The lists identify timber, range and road building projects which the USFS has determined "may adversely affect" listed species. Because defendants have halted activities which are likely to adversely affect listed species pending consultation, the bulk of activities identified by plaintiffs are those which the USFS has classified as "not likely to adversely affect." In his third declaration, Rick Roberts reviewed plaintiffs' lists of activities for which they seek injunctive relief and has identified 8 timber projects and 5 road construction projects from the Umatilla forest and 12 timber projects from the Wallowa-Whitman forest which are already complete. In addition, Roberts noted that several "range" projects were closed, vacant or voluntarily not used for 1993.

The Ninth Circuit has held that the traditional sliding scale test for preliminary injunctions,

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[14] I specifically decline to specify whether consultation between the USFS and NMFS should be formal or informal since the nature of such a consultation will necessarily depend upon the outcome of a USFS biologists' evaluation and a USFS classification—neither of which have taken place yet.

Once the USFS makes such a determination, however, its decision is subject to the arbitrary and capricious standard of review set forth in the APA. *See e.g. Seattle Audubon Society v. Evans*, 771 F.Supp. 1081, 1096 (W.D.Wash.), *aff'd in part* 952 F.2d 297, 298 & 302 (9th Cir.1991). Accordingly, I specifically decline the suggestion of both parties to "predict" either a "no effect" or a "may affect" classification.

weighing harms against the likelihood of success on the merits, is inapplicable for injunctions sought under the ESA. *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir.1987), *citing TVA v. Hill*, 437 U.S. at 173, 98 S.Ct. at 2291. Instead, a plaintiff seeking redress for violations of the ESA is entitled to injunctive relief if the agency "violated a substantive or procedural provision of the ESA," since Congress established both substantive and procedural provisions to assure adequate protection of the listed species. *Id*, at 1384.

Thus, because I have found that defendants violated the ESA by failing to initiate the § 7(a)(2) consultation process, plaintiffs are entitled to injunctive relief. However, because the nature of the challenged activity is far broader than the single construction project enjoined in *Sierra Club* and *TVA v. Hill*, the necessary scope of injunctive relief is more problematic. As noted previously, the Ninth Circuit has suggested that section 7(d) seeks to maintain the "status quo" during the consultation process. *Lane County Audubon*, 958 F.2d at 294. However, the language of § 7(d) actually only prohibits an agency from making "any irreversible or irretrievable commitment of resources ... which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives." Thus, certain ongoing activities which may be altered or modified upon completion of consultation, may proceed pending the outcome of consultation. *See e.g. National Wildlife Federation v. National Park Serv.*, 669 F.Supp. 384, 390 (D.Wyo.1987) (continued limited operation of campground pending findings on impact on grizzly bear not an "irreversible commitment" of resources proscribed by § 7(d)). Because the language in the prohibition under § 7(d) does not directly correlate to any of the classifications used by

the USFS under § 7(a)(2)—i.e. "may affect," "likely to adversely affect," or "not likely to adversely affect,"—I find that it would be inappropriate to enjoin or to permit any entire USFS classification of activity.

Again, *Lane County Audubon* provides some guidance on this issue. There, the court held that, pending § 7 consultation on the Jamison Strategy, the BLM would be enjoined from conducting any "new" timber sales, finding that the timber sales "are such [§ 7(d)] commitments." 958 F.2d at 293 & 295. However, the court held that sales announced in 1991, but not yet awarded, were "somewhat different," because they had been submitted to the FWS for individual consultations and remanded the issue of injunctive relief as to the 1991 sales to the district court. *Id.*, at 293. In the January 27, 1993 opinion and order of the district court on remand, Judge Jones prohibited the BLM from "announcing or awarding or conducting any additional sales," but excluding 1991 sales already announced "until a later date if necessary."

Applying the principles from *Lane County Audubon* to the facts in this case, the USFS is enjoined from announcing, awarding or conducting any *additional* timber sales, range activities/grazing permits, or road building projects pending compliance with ESA § 7. As for the ongoing or currently proposed projects identified by plaintiffs which have been announced, but which have not yet been completed, I note that the USFS has specifically determined that these projects not only are not likely to affect listed species, but also that they "have been found not to make any irreversible or irretrievable

commitment of resources."[15] The ESA mandates that an agency determination be given deference upon judicial review unless the action is "arbitrary, capricious or otherwise not in accordance with the law." 5 U.S.C. § 706; *Delaney v. E.P.A.*, 898 F.2d 687, 689 (9th Cir.), *cert. denied*, 498 U.S. 998, 111 S.Ct. 556, 112 L.Ed.2d 563 (1990). Plaintiffs have not challenged the USFS' determination that the identified actions do not constitute an irreversible or irretrievable commitment of resources, nor do I have a record before me which would permit judicial review of these determinations. Accordingly, the scope of injunctive relief shall be limited to any proposed future actions within the Wallowa-Whitman and Umatilla forests which fall within the definition of a § 7(d) irreversible or irretrievable commitment of a resource during the consultation period.

CONCLUSION

Based on the foregoing, I find that the USFS has violated the ESA by failing to comply with § 7 regarding the continued implementation of the Wallowa-Whitman and Umatilla LRMPs and I enjoin any future activities which fall within the scope of § 7(d) pending compliance. Accordingly, plaintiffs' motions for partial summary judgment # 53 and # 78 and motion for injunction # 91 are GRANTED as set forth in this opinion. Government defendants' motion to dismiss # 82 and defendant-intervenors' motions for summary judgment # 62 and # 81 are DENIED.

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[15] *See* the Second Declaration of Rick Roberts, page 8.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANT

[Filed Dec. 3, 1993]

ORDER

MARSH, Judge.

On October 25, 1993, I issued an amended opinion in which I granted plaintiffs' motions for partial summary judgment and for an injunction against future forest activities pending, but declined to enjoin ongoing projects which the forest service had determined were "not likely to affect listed species" and that "have been found not to make any irreversible or irretrievable commitment of resources" under ESA § 7(d).

Plaintiffs now move for reconsideration of the scope of the injunctive relief ordered and ask that I extend the injunction to all on-going activities that "may adversely affect"—a classification which

includes "not likely to adversely affect"—threatened species.

Although I decline to reconsider my opinion, I do wish to address a few points raised in plaintiffs' motion. First, plaintiffs correctly note that they did in fact argue that the Forest Service should not have permitted ongoing activities pending ESA consultation for the LRMPs. However, this argument was raised within the context of plaintiff's request for injunctive relief—the complaint and liability claims challenged only the Forest Service's decision not to engage in ESA consultations on the LRMPs. I agree with defendant-intervenors' response to this motion that the Forest Service's determination that particular ongoing actions did not involve irretrievable commitments of resources were neither directly challenged nor specifically placed before me for my review under applicable arbitrary and capricious or abuse of discretion standard. To hold that the Forest Service violated of [*sic*] the ESA without undertaking the requisite substantial, but deferential analysis of specific records would be contrary to established law in this circuit. *See e.g. National Audubon Society v. U.S. Forest Service*, No. 91-35214, slip op. 9921 (9th Cir. September 15, 1993).

Second, plaintiffs correctly note that the Ninth Circuit's decision in *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992) does not directly address the status of ongoing activities. My reliance upon *Lane County* for "guidance" in determining the scope of an appropriate injunction in this case was limited to noting that the court obviously found some difference between future and ongoing activities since it only enjoined the former and remanded the latter for further consideration by the district court. Absent further guidance from the

court regarding the appropriate scope of an injunction in these or comparable circumstance, *see Resources Ltd., Inc. v. Robertson*, No. 92-35047, slip op. 12461, at 12477 (9th Cir. November 3, 1993), I decline to re-examine the issue further. Further, for the reasons set forth above and previously in my Opinion of October 26, 1993, I decline to exercise the discretion provided under Fed. R. Civ. P. 62(c) to grant injunctive relief pending appeal.

Based on the foregoing, plaintiffs' motion for reconsideration or for an injunction pending appeal (#136) is DENIED.

IT IS SO ORDERED.

DATED this 3 day of December, 1993.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

JACK WARD THOMAS, ET AL., DEFENDANTS

[Filed Oct. 20, 1994]

OPINION

MARSH, Judge.

This action comes to me on remand from the Ninth Circuit Court of Appeals directing that I enter an injunction pending re-initiation of § 7(a)(2) consultations on Land Resource Management Plans (LRMPs) for the Umatilla and Wallowa-Whitman National Forests. In addition, the court directed that if the Forest Service (FS) re-initiated consultations, I should then consider whether ongoing or announced activities should proceed during the consultation process. My original injunction prohibited the Forest Service from awarding or announcing any new or additional commitments of resources pending compliance with the ESA.

Since the mandate issued, the Forest Service has re-initiated consultation under § 7(a)(2) on the challenged LRMPs and plaintiffs have filed a motion for permanent injunction pending completion of those consultations. According to the parties' submissions at oral argument, of the 1700 individual projects identified in the Ninth Circuit's opinion as the relevant inquiry for an injunction, approximately 307 units (groups of projects) remain at issue, 139 in the Wallowa-Whitman Forest and 182 in the Umatilla. The government also avers that there are no ongoing road construction activities currently taking place.

In addition to re-initiation of the §7(a)(2) consultations on the LRMPs, defendants have conducted § 7(d) evaluations on the challenged "not likely to adversely affect"[1] (NLAA) projects (either individually or in groups) and issued determinations that all of the proposed ongoing activities described in exhibits D-ZZ will not result in the irreversible or irretrievable commitment of resources which will foreclose the implementation of reasonable and prudent alternatives being contemplated with the LRMP consultations or the draft of PACFISH. Plaintiffs contend that these § 7(d) determinations are irrelevant pending the Forest Service's compliance with § 7(a)(2).

Although the mandate implies that the questions of the scope of the injunction on remand is a relatively simple one, the parties' well-stated, but widely diverging memoranda suggest otherwise.

Plaintiffs contend that all ongoing "may adversely affect" road building, timber harvesting and grazing

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[1] The Forest Service represents that all activities identified as "likely to adversely affect" will be halted pending completion of consultations.

activities must be halted until consultation is complete on the biological opinions for the LRMPs. At the hearing on the motion for permanent injunction, plaintiffs explained that the crux of the problem is that "may adversely affect" projects have and continue to proceed without the concurrence of the National Marine Fisheries Service (NMFS) or consultation at any level.[2] In support of this analysis, plaintiffs rely upon legislative history and those portions of the Ninth Circuit's opinion which indicate that the FS' conclusion that ongoing activities "may affect" listed salmon is "sufficient reason to enjoin these projects," and the court's reference to *Lane County* and its injunction on new sales until consultation was "completed." *PRC*, slip op. at 7441; *see also Lane County Audubon Soc. v. Jamison*, 958 F.2d 290, 293 (9th Cir. 1992) ("We enjoin pending completion of such consultation [on the Jamison strategy], the award of any sales that may be announced in the future.").

The FS contends that once 7(a) consultations are initiated on the LRMPs, the FS has the discretion to allow certain projects to continue if and when the FS determines that these projects meet the two-pronged

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[2] Shortly after the listing decisions, the FS and NMFS agreed to consult on projects on a watershed-wide basis in lieu of engaging in site-specific consultations. Thus, NMFS has not given written concurrence for any of the FS' site specific NLAA findings as required under 50 C.F.R. 402.13 to complete informal consultation.

To date, only one watershed consultation has been completed and that is for the Tucannon Subbasin. Fifteen other watershed consultations are pending for the Wallowa-Whitman and Umatilla forests and, according to the government, have been suspended pending completion of consultations on the LRMPs.

analysis of § 7(d). In light of this interpretation, the FS seeks to proceed with all NLAA activities addressed in its § 7(d) analyses pending completion of consultations on the LRMPs. In support of its position, the FS relies upon the statutory language of § 7(d) and those portions of the Ninth Circuit's opinion which reference the need only for "re-initiation" of § 7(a)(2) consultations before § 7(d) activates and the last line of the court's remand: "This [injunction against ongoing and announced projects] shall not preclude the district court from considering further modification to its injunction, in accordance with our opinion, if and when consultation is re-initiated." *Id.* at 7442.

Defendant-Intervenor NFRC's proposed analysis is similar to that of the FS, but would eliminate the need for express § 7(d) determinations. According to NFRC, once consultations are re-initiated on the LRMPs, the court is back to its original position and may rely upon the FS' original NLAA determinations to permit those NLAA activities to proceed pending completion of § 7(a) LRMP consultations because there is no threat of "harm."

These equally cogent but widely divergent views of the meaning of the mandate and the pertinent statutory procedure have made this a particularly troubling case for the court.[3] Although the Ninth Circuit directed me back to *Lane County Audubon* and *Connor*, I am compelled to return to the statute initially for guidance.

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[3] I am, however, heartened by the parties' efforts towards stipulations that allow certain activities to continue and their indication at oral argument that they may be able to reach agreement on the continuation of certain federal activities which may be necessary to avoid greater harm threatened by alternative private actions.

Section 7(d) was one of the 1978-79 Amendments to the ESA responsive to the Supreme Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978). *See generally North Slope Borough v. Andrus*, 486 F. Supp. 332, 351 (D.D.C. 1979), *aff'd in part, rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980). As Senator Culver explained, § 7(d) was designed to avoid the situation wherein a construction project reaches a stage at which options which might have been available at the outset of the project are no longer reasonable or prudent because of the foregone commitment of resources. *Id.* at 355. "Congress enacted 7(d) to prevent federal agencies from 'steamrolling' activity in order to secure completion of projects regardless of their impacts on endangered species." *Id.* at 356. Alternatives within the § 7(a)(2) process must be "consistent with the intended purpose of the action [and such] that they can be implemented within the scope of the Federal agency's authority and jurisdiction, [and in a manner] that is economically and technologically feasible." 50 C.F.R. 402.02. Thus, by ensuring consultation takes place prior to the commitment of resources, Congress specifically sought to prevent a situation like the Tellico Dam wherein opening of the dam would have violated the ESA, but closing the dam would not have constituted a reasonable, economically feasible alternative in light of the $78 million investment. *See id.* at 355, n. 79, *and* 356.

Because the text of § 7(d) is so critical to resolution of the issue with this remand, I set it out again:

> "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing

> the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

Thus, under the express language of the statute, the federal agency is only prohibited from making those commitments which involve the following two elements: (1) an irreversible or irretrievable commitment of resources; (2) which foreclose the formulation or implementation of reasonable and prudent alternatives.

In *North Slope*, the district court found that, even though Bureau of Land Management (BLM) violated § 7(a)(2) by failing to analyze all impacts of all stages of an oil and gas leasing project, expensive pre-exploration activities did not constitute 7(d) commitments because the research gained would be necessary in conducting a § 7(a)(2) analysis as well as promoting the lease program. *Id.* at 357. Thus, even though pre-exploration activities committed significant monetary resources, the circuit court affirmed this analysis of section 7(d). 642 F.2d at 611.

In *Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988), the court addressed a similar issue involving a multi-stage oil and gas lease program. Like *North Slope*, the court found that the BLM's reliance upon a biological opinion, which segmented analysis into phases of construction, was inadequate because it committed significant resources to a project that had the potential to jeopardize listed species prior to any consideration of the impacts of the "entire" agency action. *Id.*, at 1453. The court rejected the BLM's suggestion that comprehensive consultations could be avoided based upon the need for additional data. *Id.*, at 1455. However, unlike *North Slope*, the Ninth Circuit did not engage in the two-step § 7(d) analysis

as applied to specific lease and post-leasing activities, but simply applied § 7(d) to enjoin any "further leasing," or ground disturbing activities prior to the preparation of a comprehensive biological opinion. *Id.*, at 1458. In a footnote comparing NEPA to the ESA, the court stated that § 7(d) was not intended to amend section 7(a) in such a way as to condone the BLM's proposed incremental step compliance, but was meant to "clarif(y) the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process." *Id.*, 848 F.2d at 1455, n.34.

Under the language of the Ninth Circuit's remand, timber sales may not go forward because they constitute per se irreversible and irretrievable commitments of resources which violate § 7(d). Counsel for NFRC and the Forest Service make some compelling arguments regarding the impact of *National Wildlife Federation v. Burlington Northern Ry.*, 23 F.3d 1508 (9th Cir. 1994) and the accuracy of the court's citation to *Lane County Audubon*, the most questionable of which is the absence of any reference to the need for a showing of the second prong of the § 7(d) inquiry to obtain an injunction.

Nevertheless, I find that this directive is part of the law of the case. Accordingly, the Forest Service is enjoined from allowing any "may adversely affect" timber harvest activities, including NLAA timber harvest activities, to proceed pending completion of § 7(a) consultations on the LRMPs.

However, even if I went past the Ninth Circuit's conclusion that *per se* irreversible timber harvests justify an injunction under § 7(d), I would nevertheless conclude that defendants fail to satisfy the second prong of the 7(d) analysis regarding the

potential foreclosure of reasonable and prudent alternatives. The crux of the difficulty in applying the second prong of § 7(d) is an apparent contradiction contained in the statute itself and carried forward with the Ninth Circuit's mandate: first, § 7(d) specifies that ongoing activities may proceed after *initiation* of consultation, not completion, as plaintiffs contend and as the Ninth Circuit recites from *Lane County*.

However, in defining which activities may proceed following initiation of consultation, § 7(d) refers to the potential foreclosure of "reasonable and prudent alternative measures." The phrase "reasonable and prudent alternatives" is a term of art in the ESA. Section 7(b)(3)(A) describes the biological opinion (BO) which must be produced "after the conclusion of consultation" under § 7(a)(2), and "reasonable and prudent alternatives" are a product of that formal consultation process. *See also* 50 CFR 402.02.[4]

With regard to the NLAA projects, the FS argues that it has determined that no irreversible or irretrievable commitment of resources has been made which would preclude the implementation of reasonable and prudent alternatives. While some logic can be found in the determination that nothing

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[4] "Reasonable and prudent alternatives" are defined by the regulations as "alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action . . . and that the Director [of NMFS] believes would avoid the likelihood of jeopardizing the continued existence of listed species or result(ed) in the destruction or adverse modification of critical habitat." 50 CFR 402.02. The similar phrase "reasonable and prudent measures" is also a product of formal consultations and refers to those measures necessary to minimize incidental takes. *Id.*

in the continued activity is irreversible or irretrievable, I do have a problem with the reasoning which concludes that no alternatives are precluded when no "reasonable and prudent alternatives" have been identified. Until consultations reach a stage at which reasonable and prudent alternatives are identified in the BO process, any § 7(d) analysis necessarily must be premised upon guesswork. This difficulty is borne out by the parties' divergent views on what the interim standards should be. Wallowa County would have the court impose the Wallowa County/Nez Perce Tribe Salmon Recovery Plan while the FS urges the court to adopt a combination of ideas generated from PACFISH and potential refugia guidelines. From my exposure to salmon recovery plans in other, related cases, I recognize that the choices for interim standards are abundant. Until the BO reaches a stage in which the numerous theories about salmon protection measures are identified and articulated, PACFISH standards and Salmon Recovery Team recommendations are simply ideas. They are not, or at least not yet, "reasonable and prudent alternatives measures" as that term is defined in the statutes and regulations.

Thus, rather than engage in this guesswork, I find that all NLAA timber activities, save and except any that may fall within the stipulation of the parties, must be halted at least until reasonable and prudent measures are identified within the § 7(a)(2) consultation process for the LRMPs.

During oral argument, the FS raised the point that several of the timber harvest activities with which it wishes to proceed pending completion of consultations on the LRMPs are located as far as six miles from the nearest salmon spawning habitat. While this may well be true, it must be remembered

that it was the FS that made the initial determination that these particular timber activities "may adversely affect" the listed species. Although this determination was further defined as an NLAA activity, I cannot square the earlier "may affect" determination against the current assertion of *de minimis* effect. To reach such a conclusion would be akin to reclassifying the FS' determinations from a "may adversely affect" to a "no effect," something all parties would agree the court has no authority to do.

In addition, even if I accepted the FS' conclusion regarding the appropriate procedure to follow after re-initiation of consultations, I have reviewed the § 7(d) documents and note that the volume of documentation could only be possible through the relatively modern advent of word processors. For example, Forest Service biologist Del Groat was able to issue eight § 7(d) analyses covering 28 sets of ongoing rangeland activities, and 113 timber sale units all on August 11, 1994, just 13 days following the filing of the Ninth Circuit's order enjoining "any" rangeland activities pending "completion of consultation" on the LRMPs. Although I note that the analysis contained in these § 7(d) documents is not identical, it is nearly so and the majority is clearly boilerplate. Other than a few references to the fact that some of the NLAA activities take place outside the critical habitat and a few notations to the concern about the burden posed by private landowner grazing, these documents are conclusory and devoid of actual site specific analysis. They neither identify what reasonable and prudent alternative are being considered, nor do they expressly apply the PACFISH or "refugia" criteria set forth in Rick Roberts' Declaration.

I further find that any "may adversely affect" road construction or maintenance activities are closely analogous to timber harvests and thus, the same rules should apply. Plaintiffs concede that any injunction against "may adversely affect" road construction activities would *not* preclude road maintenance or road improvement activities designed to benefit the species through, for example, sedimentation prevention.

As for grazing and the removal of downed timber, I have no Ninth Circuit directive that these activities constitute *per se* irreversible or irretrievable commitments of resources. Based upon my analysis of the current status of reasonable and prudent alternatives, *supra*, I assume and find that defendants cannot show that continuation of NLAA grazing and timber removal might not foreclose the implementation of such alternatives. However, section 7(d)'s two-part analysis is stated in the conjunctive. Therefore I must still have to find that the challenged NLAA grazing and timber removal activities constitute irreversible or irretrievable commitments of resources before an injunction under § 7(d) may enter.

First, I note that these challenged activities do not involve the commitment of vast financial resources as was the case in *TVA v. Hill*, *North Slope* or *Connor*. Thus, the potential to "steamroll" these projects through without the benefit or prior consultation to secure its completion is not threatened with grazing and timber removal.

Second, although I disagree with the federal defendant's assertion that ongoing grazing constitutes the "status quo," I do accept their proffer that grazing and timber removal are the types of activities that are simply not irreversible because they are subject to

amendment and modification by the FS at any time. During oral argument, the FS offered exhibit EE as an example of a grazing permit which received an NLAA determination and a negative § 7(d) determination which permitted the activity to continue. However, following both determinations, the FS nevertheless elected to remove the cattle from portions of the allotment to prevent the possibility of that cattle would stray to critical streamside habitat. Although this kind of modification of an ongoing activity is not possible for a timber cut or the drilling of an oil well, it is possible with grazing and timber removal. Cattle may be moved, fenced, and herded to control their impacts throughout the duration of the permit. Similarly, timber may be removed by air, vehicle or animals and removal times may be altered to avoid sedimentation concerns.

According to the Ninth Circuit, once the federal defendants initiate consultations on the LRMPs, certain activities might proceed if I find that to do so would not violate § 7(d). *PRC*, slip op. at 7441-42. Because I find that ongoing NLAA grazing and removal of downed timber do not constitute irreversible or irretrievable commitments of resources at the present time, these activities may proceed pending completion of § 7(a) consultations on the LRMPs. This is not to say, however, that these activities may *never* constitute 7(d) commitments. The Forest Service remains under a duty to ensure that these NLAA activities do not become likely to adversely affect activities which might pose a threat of harm to the listed species.

Conclusion

Based on the foregoing, plaintiffs' motion for a permanent injunction (#170) is GRANTED in part and DENIED in part as follows:

GRANTED as to:

(1) All "may adversely affect" (which includes disputed NLAA activities) timber harvest and road construction and maintenance activities are enjoined pending the identification of reasonable and prudent alternatives within the § 7(a) consultation process on the LRMPs;

(2) All "likely to adversely affect" timber removal and grazing activities are enjoined pending the identification of reasonable and prudent alternatives within the § 7(a) consultation process on the LRMPs; and

DENIED as to:

(1) All 1994-95 winter NLAA grazing permits; and

(2) All NLAA removal of downed timber activities.

DATED this 20 day of October, 1994.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

JACK WARD THOMAS, ET AL., DEFENDANTS

[Filed Oct. 20, 1994]

ORDER

MARSH, Judge.

In accordance with my opinion filed on this date, plaintiffs' motion for a permanent injunction (#170) is GRANTED in part and DENIED in part as follows:

GRANTED as to:

(1) All "may adversely affect" (which includes disputed NLAA activities) timber harvest and road construction and maintenance activities are enjoined pending the identification of reasonable and prudent alternatives within the § 7(a) consultation process on the LRMPs;

(2) All "likely to adversely affect" timber removal and grazing activities are enjoined pending the identification of reasonable and prudent alternatives

within the § 7(a) consultation process on the LRMPs; and

DENIED as to:

(1) All 1994-95 winter NLAA grazing permits; and

(2) All NLAA removal of downed timber activities.

IT IS SO ORDERED.

Dated this 20 day of October, 1994.

/s/ Malcolm F. Marsh

MALCOLM F. MARSH

United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

JACK WARD THOMAS, ET AL., DEFENDANTS

[Filed Oct. 20, 1994]

JUDGMENT

MARSH, Judge.

Based on the record,

IT IS ORDERED AND ADJUDGED that plaintiffs' request for permanent injunctive relief is GRANTED in part and DENIED in part as follows:

GRANTED as to:

(1) All "may adversely affect" (which includes disputed NLAA activities) timber harvest and road construction and maintenance activities are enjoined pending the identification of reasonable and prudent alternatives within the § 7(a) consultation process on LRMPs;

(2) All "likely to adversely affect" timber removal and grazing activities are enjoined pending the

identification of reasonable and prudent alternatives within the § 7(a) consultation process on the LRMPs; and

DENIED as to:

(1) All 1994-95 winter NLAA grazing permits; and

(2) All NLAA removal of downed timber activities.

This directive is in addition to the injunction entered previously on October 25, 1993.

Dated this 20 day of October, 1994.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CV 92-1322-MA

Nos. 93-36162 and 94-35042

PACIFIC RIVERS COUNCIL;
OREGON NATURAL RESOURCES COUNCIL;
HELLS CANYON PRESERVATION COUNCIL;
THE WILDERNESS SOCIETY;
OREGON NATURAL DESERT ASSOCIATION;

Plaintiffs-Appellants-
Cross-Appellees

v.

JACK WARD THOMAS, IN HIS OFFICIAL
CAPACITY AS CHIEF OF THE UNITED
STATES FOREST SERVICE;
UNITED STATES FOREST SERVICE;

Defendants-Appellees-
Cross-Appellants

[Filed September 22, 1994]

ORDER

Before: WRIGHT, TANG and REINHARDT, Circuit Judges.

The panel voted to deny appellees-cross-appellants' petition for rehearing. Judges Wright and Tang recommend rejection of the suggestion for rehearing en banc. Judge Reinhardt has voted to reject to the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CV 92-1322-MA

Nos. 93-36162 and 94-35042

PACIFIC RIVERS COUNCIL;
OREGON NATURAL RESOURCES COUNCIL;
HELLS CANYON PRESERVATION COUNCIL;
THE WILDERNESS SOCIETY;
OREGON NATURAL DESERT ASSOCIATION;

Plaintiffs-Appellants-
Cross-Appellees

v.

JACK WARD THOMAS, IN HIS OFFICIAL
CAPACITY AS CHIEF OF THE UNITED
STATES FOREST SERVICE;
UNITED STATES FOREST SERVICE;

Defendants-Appellees-
Cross-Appellants

[Filed August 4, 1994]

ORDER

Before: WRIGHT, TANG and REINHARDT, Circuit Judges.

It is ordered that the mandate issue forthwith. The district court shall resume control of this matter. This order shall be without prejudice to this court's authority to entertain and act upon petitions for rehearing or suggestions for rehearing en banc.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CV 92-1322-MA

Nos. 93-36162 and 94-35042

PACIFIC RIVERS COUNCIL;
OREGON NATURAL RESOURCES COUNCIL;
HELLS CANYON PRESERVATION COUNCIL;
THE WILDERNESS SOCIETY;
OREGON NATURAL DESERT ASSOCIATION;

Plaintiffs-Appellants-
Cross-Appellees

v.

JACK WARD THOMAS, IN HIS OFFICIAL
CAPACITY AS CHIEF OF THE UNITED
STATES FOREST SERVICE;
UNITED STATES FOREST SERVICE;

Defendants-Appellees-
Cross-Appellants

[Filed July 29, 1994]

ORDER

Before: WRIGHT, TANG and REINHARDT, Circuit Judges.

The United States Forest Service is enjoined from announcing or awarding or conducting any logging, grazing or road-building projects, pending completion of consultation on the Wallowa-Whitman and Umatilla National Forest Land and Resource Management Plans in accordance with Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2); none of the foregoing, however, shall prevent the Forest Service from proceeding with ongoing road maintenance projects. This injunction shall be effective immediately and shall continue in effect until issuance of this court's mandate or further order of this court. Further, we remand to the district court for the limited purpose of allowing it to issue such further orders as it may deem advisable 1) permitting the implementation of projects that benefit the salmon, and 2) enjoining road maintenance projects that adversely affect the salmon.

APPENDIX J

1. 16 U.S.C. 1536(a)(1), (a)(2) and (d) provide as follows:

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

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(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

2. 16 U.S.C. 1604(a)-(f) provide as follows:

§ 1604. National Forest System land and resource management plans

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a

systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

(c) Incorporation of standards and guidelines by Secretary; time of completion; progress reports; existing management plans

The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976, and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incorporation in the annual report required by section 1606(c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with this subchapter, the management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at

locations that foster public participation in the review of such plans or revisions.

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

(f) Required provisions

Plans developed in accordance with this section shall—

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;

(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

3. 50 C.F.R. 402.02 provides, in pertinent part:

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.